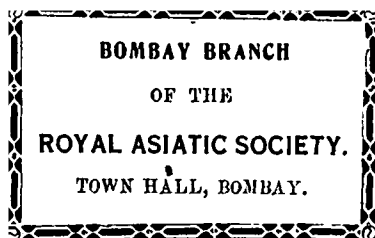




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Bombay High Court Reports.

VOLUME XII.

REPORTS OF CASES DECIDED IN THE HIGH COURT OF BOMBAY.

1875.

78555

EDITED BY

W. E. Hart

W. E. HART, B.A.,
(OF THE INNER TEMPLE),
BARRISTER-AT-LAW.

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JUDGES OF THE HIGH COURT OF BOMBAY.

THE HONORABLE SIR MICHAEL ROBERTS WESTROPP,
KT., CHIEF JUSTICE.

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THE HONORABLE ANDREW RICHARD SCOBLE, *Advocate
General.*

J. R. NAYLOR, Esquire, C. S., *Legal Remembrancer.*

NAMES OF REPORTERS.

ORIGINAL SIDE.

W. E. HART, B.A., Barrister-at-Law.

APPELLATE SIDE.

KHANDERA'V CHIMANRA'V BEDARKAR, B.A., LL.B.
VISHNU GHANASHAM, Vakíl, High Court.



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CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

[APPELLATE CRIMINAL JURISDICTION.]

1875.
February 10.

The Appeal of the Government of Bombay.

REG. v. RA'MA'JIRA'v JIVBA'JIRA'v and another.

The Indian Penal Code, Section 21, Clause 9, and Section 193—Public Servant—Officer—Izāphatdār—The Code of Criminal Procedure, Sections 455 and 456—Charge—Conviction of offence not charged—Re-trial.

The word "officer" in Section 21, Clause 9, of the Indian Penal Code means a person employed to exercise to some extent a delegated function of Government : he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. Hence an *Izāphatdār*, i. e., a lessee of a village who has undertaken to keep an account of its Forest revenues and pay a certain proportion to the Government, keeping the remainder for himself, is not an officer, and, therefore, not a public servant within the meaning of Section 21.

The making up falsely of accounts with the intention of producing them before a Forest officer not empowered by law to hold an investigation and take evidence is not a fabrication of false evidence within the meaning of Section 193 of the Indian Penal Code.

Where a person was charged by an Assistant Session Judge with (1) attempting to commit criminal breach of trust as a public servant ; (2) framing as a public servant an incorrect document to cause an injury ; (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent,

The High Court held that the Judge ought to have convicted him of attempting to cheat under Sections 455, 456 of the Code of Criminal Procedure ; and, as the facts which he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing, though not distinctly taken in their appeal by the Government, and ordered a re-trial of the accused.

1875.

REG.

v.
RA'MA'JIRA'V
JIVBA'JIRA'V.

THE accused No. 1, Rámájiráv bin Jivbájiráv, was tried before George Ayerst, Assistant Session Judge of Tanna, under Sections 409, 511, 167, 218, and 193 of the Indian Penal Code, of having, as a public servant, attempted to commit criminal breach of trust; of having, in the same capacity, fraudulently framed an incorrect document to injure, and of having similarly framed such a document with intent to save a person from punishment. The second accused was tried of having abetted the first in the commission of these offences, and both were acquitted on all heads of charge.

The facts of the case are thus stated in the finding of the Assistant Session Judge:—

“Accused No. 1, Rámájiráv, is the Izáphatdár (lessee of forest revenues) of the village of Varsále. He passed an agreement, Exhibit G, to the Collector. It is alleged for the prosecution, and, for the purpose of the present argument, it may be assumed to be true, that the accused No. 2, Parshráam, is the agent of accused No. 1, Rámájiráv. That in accordance with Exhibit G the former, at the instance of the latter, prepared certain accounts which corresponded with the passes given to the cartmen who took away the wood from the Varsále jungles. That these accounts, Exhibit A, were shown to the Forest Inspector as correct. That another set of accounts, Exhibit D, was found in the house of accused No. 1, from which accounts and from other evidence it appears that the accounts, Exhibit A, were false and incorrect. That they were framed with a view to defraud Government, to whom accused No. 1, Rámájiráv, had agreed to pay five annas in the rupee of the total profits, barring one-third remitted for conservancy expenses.”

Upon these facts Mr. Ayerst found that the accused Rámájiráv was not a public servant within the meaning of the Penal Code, and that the forest officer to whom he produced the accounts was not an officer empowered by law to collect forest dues, although he regretted to find that a very

considerable fraud had, in fact, been committed by the accused persons upon the Government.

The appeal was heard by WEST and NA'NA'BHA'I HARI-
DA'S, JJ.

1875.

REG.

v.
RA'MA'JIRA' v
JIVEA'JIRA' v.

Dhirajlál Mathurádás, Government Prosecutor, for the Government:—The accused No. 1, Rámájiráv, is a lessee of the village of Varsále, which was formerly under attachment. On the attachment being removed an agreement was entered into between him and the Government, whereby, in consideration of receiving a third of the forest revenues, he undertook to pay five annas in the rupee on the remaining two-thirds, and agreed to supply the Government with full particulars of the timber he proposed to cut each year, to issue passes to the labourers employed in cutting it, and keep accounts of the entire forest revenues. It is thus clear that it was part of the first accused's duty to keep accounts, and he was remunerated by payment of a proportion of the revenues: in other words, he was paid by fees. The Government had employed him to perform this duty for them. He is, therefore, an officer within the meaning of Section 21 of the Indian Penal Code, and the Judge below was wrong in holding he was not. The Judge has admittedly disposed of this case on this technical point, for on the merits he distinctly holds that the first accused committed a very considerable fraud upon the Government, and that the second accused, his servant and manager, abetted him. Section 457 of the Code of Criminal Procedure provides that "when a person is charged with an offence and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence which he was proved to have committed, though he was not charged with it." When the Judge found that the accused Rámájiráv was not a public servant, he ought to have found him guilty of attempting to cheat. The accused ought also to have been found guilty of fabricating false evidence, as the false accounts were intended for production before the forest officer, a public servant.

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Branson and Hon'ble Mandlik for the acquitted accused.

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Branson :—The accused No. 1 is a mere lessee. His rights and liabilities arose out of the contract with Government, not by virtue of any office or employment. A person whom the law considers as subject to an income tax is bound to account for his profits and income; but he cannot, therefore, be an officer. Section 21 distinguishes officers from persons who are public servants.

Mandlik :—The Government in their appeal to this Court do not urge that the Judge below committed an error in not finding the accused guilty of attempting to cheat; and the Government Prosecutor cannot take the objection now. In *Reg. v. Abdul Sáheb (a)* MORGAN, C.J., and HOLLOWAY, J., held that, although the Session Judge might have allowed convictions for some offences for which the accused were manifestly guilty to stand, they would not, in the exercise of their discretion, reverse the acquittal under Section 272. With regard to the argument that Rámájiráv should have been convicted under Section 193 of the Penal Code, the forest officer was not by any law empowered to collect dues.

February 3rd.—WEST, J.:—We are of opinion that the word “officer” in clause 9 of Section 21 of the Indian Penal Code is used in a definite sense. It is not superfluous (the words “whose duty it is as such officer” sufficiently show this), and is not merely equivalent to the word “person,” which occurs in several clauses of the same section. We do not think that the fact of certain duties being enumerated as constituting one, who is an officer, a public servant, necessarily has the effect of making any one, on whom any of those duties devolves, an officer. Two things must combine to meet the requirements of the clause quoted above. In the first place, there must be an officer; and, in the second, he must be under an obligation to perform one of the duties there enumerated.

We must, therefore, see who is an officer. It is clear that it is not every one who has to do with Government in pecuniary matters, or who has to render accounts, or to submit documents, who is a Government officer. Seeking the help of English law, we find, in Bacon's Abridgment at Vol. 6, page 2, the article headed "Of the nature of an officer, and the several kinds of officers," commencing thus: "It is said that the word 'officium' principally implies a duty, and, in the next place, the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer." And the next paragraph goes on to say: "There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, herd a flock, &c.; which differ widely from that of steward of a manor," &c. The first of these paragraphs implies that an officer is one to whom is delegated, by the supreme authority, some portion of its regulating and coercitive powers, or who is appointed to represent the State in its relations to individual subjects. This is the central idea; and applying it to the clause which we have to construe, we think that the word "officer" there means some person employed to exercise, to some extent, and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of some one who is so armed. *Deshmukhs* and *Deshpandes* would thus be sufficiently within the meaning of the clause, they being appointed to perform for the State a portion of its functions, or to aid those who are its active representatives, but not an *Izaphat-dár* or lessee such as the accused. In consequence of some dispute pending between him and the Government, the possession of a village is withdrawn from him, but it is restored to him on his undertaking to keep accounts of the forest revenues and pay five-sixteenths of the proceeds to the Government after making, in the first place, a certain deduc-

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1875. tion, namely, of one-third of the receipts, for himself. He
 REG. is, we think, not an officer, but a mere contractor bound by
 v. his engagement, but not, by the terms of an office or em-
 RA'MA'JIRA'V ployment, to pay a certain proportion to Government.
 JIVRA'JIRA'V. There is no delegation to him of any authority for coercion
 or interference, nor is he an assistant appointed to help
 any one who is vested with such authority. He appears to
 have had the rights only of a private proprietor, and to
 have exercised them entirely at his own discretion. It de-
 pended entirely on him to allow any person at all to cut tim-
 ber within the limits of his village. He could make his own
 terms. He was bound by his agreement to give passes to all
 who cut timber in order to prevent fraud on the Govern-
 ment, but the penalty for omitting to give these passes was
 that the timber taken without them was to be treated as
 Government property, and thus be subject to a second pay-
 ment. A collateral undertaking of this kind did not make
 him an officer, nor did his undertaking to keep accounts.
 These were contractual duties, fraudulent deception in dis-
 charging which might subject him to punishment for cheat-
 ing, but not duties attached to any office conferred on him
 or his predecessor in title, failure to perform which with in-
 tegrity could make him liable, as an officer, to the special
 penalties prescribed for delinquent public servants.

February 10.—The fabrication of accounts in this case, if
 they were fabricated, was not a fabrication of false evidence
 within the meaning of Section 193 of the Indian Penal
 Code. To fabricate false evidence is to do something which
 satisfies the definition in Section 192, and to this it is essen-
 tial that there should be an intent that the false entry or
 statement should be used “in a proceeding taken by law be-
 fore a public servant as such.” It does not appear that the
 forest officer, much less that his subordinate, was empowered
 by law to hold an investigation and take evidence in any
 matter at all. His functions seem to be purely ministerial,
 and no proceedings, by way of investigation, being provided
 for and regulated by law, the statement laid before him,

though false, would not be false evidence fabricated so as to expose the fabricator to the penalties of Section 193.

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The point last taken is that the Assistant Judge ought to have convicted the accused severally of attempt at cheating and abetment of that offence. This point was probably not present to the mind of the Government Prosecutor when he drew up the appeal, although in a vague way it is covered by his fourth ground of objection, and we should not have allowed it to be argued, had we thought that the accused would thus be unfairly prejudiced. But we do not think that they are unfairly prejudiced, and further time has not been asked for by their advocate on the ground of surprise. We, therefore, proceed to consider the objection on its merits.

Section 456 of the Code of Criminal Procedure, taken with Section 455 of the same Act, would, we think, have enabled the Assistant Session Judge to convict the accused in this case of attempting to cheat and abetting that offence, though they were not directly charged with these crimes. The legal character of the acts done by them might well be considered ambiguous, and the evidence given would apply to the one offence as well as to the other. In being called on to rebut the charge of attempt to commit criminal breach of trust and of abetment, the accused had to meet the same facts as if they had been charged with attempt to cheat; it was only the legal aspect of them that would be varied in the two cases. This being so, and the Assistant Session Judge having held that the accused had in fact falsified accounts in order to defraud the Government, we think he ought, holding the view he did, to have convicted the accused under the provisions of Section 456, though it would have been still better had he acted on the suggestion of the committing Magistrate and prepared charges of attempt at cheating and abetment of that offence. It would be, we think, a wrong exercise of our discretion, if we did not, in such a case, order a re-trial of the accused, and we, accordingly, direct that they be re-tried.

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 JIVEA'JIRA'V. This re-trial is to be held by a different Court, but, as held, for the purpose of Section 473, in the case of *Reg. v. Gulábdás Kuberdás (b)*, a different court is, we think, constituted by the Session Judge from that of the Assistant Session Judge. His mind is as likely to be free from prejudice as that of any other judicial officer; and looking to the definition of Criminal Court in Section 4, the requirement of the law will thus be satisfied at the least cost of public and private inconvenience.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION.]

January 19.

Suit No. 138 of 1871.

MIRZA' ALI AKBAR, Khán Bahádúr *Appellant.*

ABDUL LATIFF SHUSTRI and others *Respondents.*

Practice—Petition for leave to appeal to the Privy Council, and a certificate under Act VI. of 1874 Sections 5, 7, and 9.

IN reply to a question to the Court (WESTROPP, C.J., and WEST, J.) on the point of practice, by *Scoble, A. G.*, who represented one of the respondents :

WESTROPP, C.J., said :—We think that the petition itself should distinctly state what the substantial question] of law is that it is proposed to submit to the Privy Council, and that, at this side of the Court, all petitions for leave to appeal to the Privy Council should be signed by counsel, and that, at the other side of the Court, such petitions should be signed by counsel, or a pleader.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 814 of 1873.*1875.
January 23.

SOKA'BA'I Plaintiff.
LAKSHMIBA'I Defendant.

Practice—Costs—Payment of the costs of a summons not a condition precedent to proceeding with the Suit.

The Court will not order, as a condition precedent to proceeding to the hearing of a suit, the payment of the costs of a summons adjourned from chambers into court and there dismissed with costs.

Scoble, A. G., on behalf of the defendant, moved on affidavit, and after notice of motion, that the plaintiff should be ordered to pay the costs of a summons in chambers before MARRIOTT, J., and adjourned by him into Court, and there dismissed with costs, as a condition precedent to proceeding to the hearing of the suit.

Inverarity for the plaintiff:—The Court has no power to make such an order, especially as the summons was dismissed on technical grounds, not on the merits. There is no allegation that the defendant has not exhausted her remedy by attachment. The only case in which the payment of costs is made a condition precedent is when another suit is brought on the same cause of action: *Gibbs v. Golea* (a), *Shorediecke v. Gilbard* (b), and *Aime v. Chinnoek* (c).

Scoble, in reply:—The plaintiff is purposely keeping out of the way. The rules of practice here are not so stringent as those in the common law courts in England. The High Court in this country absolutely controls the cause lists, and, therefore, has power to say that this case shall not come on until the plaintiff shall have paid the costs of the summons. These costs were incurred by the action of the plaintiff herself in taking out the summons in chambers, which was subsequently dismissed.

(a) 7 Dowl. 325. (b) 8 Dowl. 296, (c) 8 Dowl. 736,

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BAYLEY, J.:—The learned Advocate-General has cited no case as an authority for the making of such an order as that for which he asks, while, on the other hand, though in two of the cases cited by Mr. Inverarity, viz., *Gibbs v. Goles* and *Aime v. Chinnoek*, the circumstances relied on by the counsel asking for the order were considerably stronger in his favour than they are in the present case, yet the orders were refused. The defendant appears to me to have taken quite a mistaken view of her position. I must, therefore, refuse to make any such order as that for which she asks. The costs of this application to be borne by the defendant.

[APPELLATE CIVIL JURISDICTION.]

February 10.

Special Appeal No. 82 of 1874.

SULEMA'N VA'DU and three others.....*Appellants.*

TRIKAMJI VELJI*Respondent.*

Vendor and Purchaser—Sale of land—Specification of area—Misdescription.

The specification in a deed of sale of land of the area of the land sold *prima facie* implies that the area was regarded as material by the parties, and, unless it is clear that the precise area was not regarded as material, proportional compensation will be awarded to the purchaser of land, the real area of which is found to fall short of the area specified in the deed of sale.

THIS was a special appeal from the decision of DeH. Larpent, Judge of the District of Poona, amending the decree of the late Court of the Principal Sadar Amin of Poona.

The material facts of the case are briefly as follows:—

On the 17th September 1863, Ladhá Ibráhim, whom the special appellants represent, purchased from one Ramábái a field called Ghorkhillá for Rs. 2,999. On the 26th September following he sold it to the plaintiff, now special respon-

dent, for Rs. 19,999. The deed under which the sale to the plaintiff took place begins by reciting the purchase from Ramábái as well as the purchase by the latter from one Usaf, the original proprietor. It specifies the boundaries, gives the measurement of the field as 30 acres and a little more, the same quantity as was mentioned in the previous deeds, and states the price to be at the rate of Rs. 500 per *bighá*.^{*} It is admitted by both parties that the right measurement of the field is only 19 acres, but this was discovered by the plaintiff in 1865 when he took possession from the vendor's sub-tenant. The plaintiff, therefore, brought this suit, and prayed that the sale might be cancelled (which prayer he abandoned in appeal before the Judge), or if that could not be done, claimed Rs. 7,000 damages.

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TRIKAMJI
VELJI.

With respect to damages, both the lower courts agreed in awarding them.

The principal question raised in the High Court was as to whether the award of damages was proper.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Farran (with him *Hon'ble Mandlik*) for appellants :—
Ladhá sold to the plaintiff what he bought himself, viz., the field Ghorkhillá, contained within certain boundaries. This description, which is identical with that contained in the previous deeds, is enough to identify the land, and the mention of the area is surplusage. An error in it does not affect the transaction, which was completed by the full payment of the purchase-money. And it is conceded that there is no fraud. Falsehood without fraud is not actionable : *Collins v. Evans* (a), *Kennedy v. Panama, New Zealand, and Australian Royal Mail Company, Limited* (b).

Starling (with him *Inverarity*) for the special respondent :—
What the plaintiff contracted to purchase was 30 acres at Rs. 500 per *bighá*, and this he did not get. The mention

^{*} A *bighá* is about $\frac{2}{3}$ of an acre.

(a) 5 Q. B. 820. (b) L. R. 2 Q. B. 580, 586.

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of the same quantity of land that the vendor had himself bought makes no difference. A purchaser is entitled to recover part of his purchase-money when the property has been misdescribed unintentionally : Dart. 124, 597 ; Sugden 27,31, 325 ; *Whittemore v. Whittemore* (c). A substantial misrepresentation, such as this, entitles the plaintiff to be relieved : *Dimmock v. Hallett* (d), *Aberman Iron Works v. Wickens* (e), *Demy v. Hancock* (f). A conveyance of too much may be rectified after the purchaser has entered into possession : *Townsend v. Stangroom* (g), *Carpmael v. Powis* (h) referred to in Dart. 683 ; *Garrard v. Frankel* (i) ; *Harris v. Pepperell* (j).

WEST, J., delivered the judgment of the Court. After disposing of a preliminary point, he said :—The land sold is described in the conveyance as containing 30 acres. It appears to have contained only 19 acres. This is a very material discrepancy ; but it is said that the specification of the area following the statement of the survey number and boundaries was a mere matter of description, and that an error in this respect, after the transaction had been completed, affords no ground for compensation. No case precisely on all fours with the present one has been cited to us from the English reports. In *Whittemore v. Whittemore* there was an express provision against annulment and for compensation in case of misdescription. The question was whether the operation of this condition was excluded by another which in terms excluded compensation on account of any error as to quantity. Those cases in which a deed, failing to express the real intention of the contracting parties, has been relieved against, rest on a principle not quite applicable to the one we have to deal with. The question seems to be whether the area of the field, as specified, was an essential part of the consideration for the payment made by the plaintiff, or whether, although the area is set down as matter of description, he bought and took the land as a particular object identified and estimated for the pur-

(c) L. R. 8 Eq. 603. (d) L. R. 2 Chan. Ap. 21. (e) L. R. 4 *id.* 101.
 (f) L. R. 6 *id.* 1. (g) 6 Ves. Jun. 333. (h) 10 Beav. 36.
 (i) 30 Beav. 445. (j) L. R. 5 Eq. 1.

pose of the contract independently of the circumstance of its area being or not being so much as 30 acres. *Primâ facie* the specification of the area implies, we think, that the area is regarded as material by the parties, and is the quality, or one of the qualities, specially had in view as the basis of their contract. The Roman law gave an action *ex empto* in such a case: "*Et quidem tenetur ex empto venditor etiamsi ignoraverit minorem fundi modum esse*": Poth. Pan. L. 19 T. I. Section 68. Paulus is cited in the next section to the same effect. Pothier himself lays down the principle of proportional compensation in his *Traite de Vente*, Section 258; and Sections 1617, 1622 of the Code Civil embody a similar rule. It appears to be founded on justice, and to be the one which should be applied in all such cases, except where it is clear that the precise area was not regarded as material.

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VELJI.

We, therefore, confirm the decree of the District Court with costs.

Decree confirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 362 of 1873.

February 10.

RAMA'BA'I SA'HEB PATVAR- } *Defendants and Appel-*
DHAN and another } *lants.*

APPA' and others *Plaintiffs and Respondents.*

Jurisdiction—Agent's Court—Suit against a Sardâr—Practice—Point not raised in the Lower Courts.

Creation of the defendant as Sardâr in 1867 cannot have a retrospective effect so as to affect a suit instituted against her in the civil court in 1861 and to render the decree of that court one without jurisdiction.

A point not raised in the courts below, was disallowed as being too late when raised in the special appeal for the first time.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, reversing the decree of Mukund Bâlâji, Second Class Subordinate Judge of Tasgaum.

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 RAMA'BA'ISA'
 HEB PATVAR-
 DHAN and
 another.
 v.
 APPA' and
 others.

Appá brought this suit against Ramábái Sáheb and Rango Keshav to recover from them some land. The court of first instance threw out the claim on the ground that the plaintiff failed to prove it. On appeal, the District Judge reversed that decree, and allowed the plaintiff's claim. In special appeal, the following two grounds in the memorandum of appeal were particularly urged:—

(c.) The lower court ignored the facts that there was formerly a suit of ejectment by the present appellants against their tenants, the present respondents, and in pursuance of the decree of the Bombay Government, 25th March 1858, the appellants were actually put in possession on the 6th July 1859, and that for this reason the alleged vendor, Rango, could not be in possession at the date of the deed of sale.

(g.) The lower court had no jurisdiction, inasmuch as the suit ought to have been instituted in the Agent's Court.

The appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 10th February 1875.

Shántárám Náráyan for the special appellants.

Leith (with him *Bhairavnáth Mangesh*) for the special respondents.

WESTROPP, C.J.:—The point as to possession in clause (c) of the memorandum of appeal was not raised in the court, below, and is now too late. The point in clause (g) of the same memorandum, that Ramábái became a Sardár in 1867, and, therefore, that this suit would lie against her in the Agent's Court only, and not in the subordinate civil courts is unsustainable, inasmuch as the creation of her as a Sardár in 1867 cannot be permitted to have a retrospective effect. This Court affirms the decree with costs.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 182 of 1874.*1875.
February 15.KUSHA'BA' BIN SANKROJI } *Plaintiffs and Appellants.*
and another PITA'MBARDHA'RI and } *Defendants and Respon-*
GOVINDRA'V } *dents.** *Regulation IV. of 1827, Sections 62 and 66 (a)—Title—Limitation.*

All that passed under a court's sale under Regulation IV. of 1827 (like a similar sale under the Civil Procedure Code) was the right, title, and interest of the judgment-debtor, whose property was proclaimed for sale, and it was quite open to a person claiming such property as his own, to contest the right of the auction-purchaser (and those claiming under him) to interfere with his possession at any time within 12 years of the occurrence of the disturbance.

THIS was a special appeal from the decision of G. Ayerst, Assistant Judge at Poona, reversing the decree of the Principal Sadar Amin of the same place.

The special appeal was argued before KEMBALL and NA'NA'-BHA'I HARIDA'S, J.J.

Bhairavnáth Móngesh for the appellant.

Shántarám Náráyan (with him *Manikshá Jahángirshá*) *contra.*

The facts of the case fully appear from the following judgment of the Court delivered by

KEMBALL, J.:—In this suit the plaintiffs sued for a declaration of title and consequential relief in respect of a certain house consisting of 5 double *khans*, alleging that the site of the house was given by Bundele to their ancestors some 75 years ago, when they built the house; that they subsequently let 6½ out of the 10 *khans* to the second defendant, retaining in their own occupation 3½ *khans*; that the first defendant forged a rent-note, Exhibit No. 6, bearing date 30th November 1868, purporting to have been passed by the plaintiffs to him; further that their tenant, the second defendant, collusively attorned to the first defendant, and that thus their possession and title were obstructed. The defendants'

(a) These sections have been repealed by Act X. of 1861.

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 KUSHA'SA'BIN
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 another
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 PITA'MBAR-
 DEHA'RI AND
 WINDRA'V.

case was that some time before the year 1856 (when Regulation IV. of 1827 was in force), a decree was obtained against Bundelee when the land and house in dispute (as the property of Bundelee) were sold in execution; that one Bábáji bin Sadoji became purchaser in July 1856 and re-sold shortly after to one Báláji Ganesh Bhide; that the first defendant purchased the said property from the said Báláji on the 17th July 1872, and that the first defendant leased $3\frac{1}{2}$ *khans* of the house to the plaintiffs and $6\frac{1}{2}$ *khans* to the second defendant. The Subordinate-Judge, after laying down several issues, found that the house and site were the property of the plaintiffs; that they were sold as the property of Bundelee; that they never passed to the auction-purchaser nor left the plaintiffs' possession; that the plaintiffs leased a portion, consisting of $6\frac{1}{2}$ *khans*, to the second defendant, and that the rent-note alleged to have been passed by the plaintiffs to the first defendant, was a forgery (apparently with good reason, seeing it is dated four years before the sale to the first defendant), and accordingly decreed in plaintiffs' favour.

Against this decree the first defendant appealed to the District Court of Poona, when the Assistant Judge reversed the decree of the lower court, on the ground that the suit was barred, the reason being that, under Regulation IV. of 1827, sales under a decree did not extend merely to the right, title, and interest of the judgment-debtor; in other words, that property so sold passed absolutely to the auction-purchaser, no matter whose property it actually was, or whose it was declared to be, and that as the sale took place in 1856, the suit was barred by the lapse of more than 12 years from that time. But we cannot concur in the view taken by the Assistant Judge of the effect of sales under Regulation IV. of 1827. Then, as now, all that passed was the right, title, and interest of the judgment-debtor, whose property was proclaimed for sale, and it is quite open to the plaintiffs to contest the right of the auction-purchaser, or those claiming under him to interfere with their possession at any time within 12 years of the occurrence of the obstruction. There are several decisions of the old Sadar Court

bearing upon this point, which we think it as well to note—3 Morris 53, decided 28th March 1856; 4 Morris 24, 15th May 1857; 8 Harrington 232, 23rd September 1861; 9 Harrington 294, 31st March 1862; 7 Harrington 132; 7 Harrington 218; 7 Harrington 257; 2 Morris 51; and 2 Morris 262.

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PITA'MBAR-
DHA'RI AND
GOVINDRA'

The Assistant Judge has thrown out the case on the preliminary point of limitation. We must, therefore, in reversing his decree, return the case that he may dispose of the appeal on the merits. Costs to follow judgment.

[APPELLATE CIVIL JURISDICTION.]

Cross Special Appeals Nos. 271 and 338 of 1874.

February 19.

No. 271.

GOPA'L KA'SHI *Defendant and Appellant.*

RAMA'BA'ISA'HEB PATVAR-
DHAN and another ... } *Plaintiffs and Respondents.*

No. 338.

RAMA'BA'ISA'HEB PATVAR-
DHAN and another ... } *Plaintiffs and Appellants.*

GOPA'L KA'SHI *Defendant and Respondent.*

Suit by a Hindu widow having a son—Limitation—Act XIV. of 1859—Certificate of guardianship—Act XX. of 1864—Civil Procedure Code, Section 73.

In 1864 a Hindu widow, having a minor son, sued, in her own name and on her own behalf, to recover certain immoveable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871, the son, who had in the meantime attained his majority in 1866, was made a co-plaintiff on his own application:

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GOPAL KASHI
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RAMABAI
SAHEB PAT-
VARDHAN and
another.

Held that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff the plaint previously to that time having been in the widow's own name and expressly on her own behalf.

Held also that as the widow had no certificate of guardianship, she was precluded by Act XX. of 1864 from bringing a suit in her own name in respect of her son's property, and that making the son a co-plaintiff in 1871 could not change the character of the suit, as it had existed previous to that date so as to defeat the law of limitation.

Held (by Pinhey, J.) that the minor was wrongly made a plaintiff in 1871. *Durm Das Panday v. Mussumut Sham Soondri* (6 Calc. W. R. P. C. 44). distinguished.

THESE were cross special appeals from the decision of E. Hosking, Assistant Judge at Satara, amending the decree of Vasudev Nilkanth, Subordinate Judge of Tasgaum.

Ramabai Sahib, widow of the late Bhau Sahib Patvardhan, in 1864 sued to recover possession of certain land in Kasbe Bhilawadi from the defendant Gopal Kashi, and stated that the same had been let to the defendant in 1847 under a lease which expired in 1854. The suit was brought by Ramabai in her own name, and in her own right as the heir of her husband, although she had, at the time, a minor son, named Ganpatrav, who did not attain his majority until 1865. Gopal denied the lease, and contended that it was not competent to Ramabai to maintain the suit on her own behalf, and urged that it should be dismissed. On the 17th March 1871, Ganpatrav was allowed, under Section 73 of the Civil Procedure Code, to join the suit as co-plaintiff with Ramabai. Thereupon the defendant contended that the period of limitation should be calculated back from the time when Ganpatrav joined the suit, and that, therefore, the claim was barred by the Limitation Act, as it was brought after the lapse of more than twelve years from the time when the cause of action accrued in 1854. Both the lower courts held that Ganpatrav was properly made a co-plaintiff, and that the claim was not barred by limitation, as it was filed by Ramabai within the period of limitation. They, accordingly, decreed in plaintiffs' favour part of the land, and rejected the claim to the remaining part, on the ground that the plaintiffs failed to prove their right thereto

In special appeal, the principal contention was on the point of limitation. 1875.

The special appeal was argued before SARGENT and PINHEY, JJ., on the 19th of February 1875.

GOPA'LKA'SHI

v.
RAMA'BA'I
SA'HEB PAT-
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Bhairavnáth Mangesh, for the appellant, contended that Ganpatráv ought not to have been made a party to the suit, as his interest was not thereby affected within the meaning of Section 73, Civil Procedure Code: *Joy Govind Doss v. Goureeprashad (a)*, *Mussamat Khodeja v. Akmed Hossein (b)*. Ramábái could not be said to have brought the suit on behalf of her son while a minor, because she had obtained no certificate as required by Act XX. of 1864, Section 2, nor under Section 20 of that Act, could she maintain it in her own name after the son's minority ceased. Moreover, if it was a suit on behalf of the son, it must be considered to have been instituted on the 17th March 1871, when he was made a party, and limitation must be calculated back from that time. The claim, therefore, was barred: *Kishen Loll Chowdhry v. Chunder Coomar Roy (c)*, *Mánaklál v. Bháskarráv*, S. A. No. 494 of 1871, decided by GIBBS and MELVILL, JJ., on the 12th February 1872, *Shivrám Vithal v. Bhagirthibái (d)*.

Shántarám Náráyan for the respondents submitted that the suit, though instituted by Ramábái in her own name, might be regarded as brought by her on behalf of her son. It was so regarded by the Privy Council in a case in which a Hindu widow (plaintiff) adopted a son after the institution of the suit by her for the recovery of her husband's share in the family property: *Durn Das Panday v. Mussumat Shám Soondri (e)*.

SARGENT, J.:—This action was originally instituted by Ramábái Saheb to recover certain lands, which had formed part of the *saranjám* of her late husband, Bháu Sáheb, on the ground that they had been leased to the defendants in 1847

(a) 7 Calc. W. Rep. Civ. R. 202.

(b) 10 Calc. W. Rep. Civ. R. 369.

(c) Calc. W. Rep. for 1864, Civ. R. 152.

(d) 6 Bom. H.C. Rep. A.C.J. 20. 22.

(e) 6 Calc. W. Rep. P. C. 44.

1875. for the term of seven years. It was brought in her own name, purported to be in her own behalf, and did not even mention the existence of her son Ganpatráv.

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The defendants, by their written statement, contended that Ramábái had no cause of action, there being a son living. On 23rd December 1870, she made a representation to the Court (Exhibit 80), in which she claims exclusively in her own right as heir of her husband, her son not having been acknowledged by the British Government. She further contends that in any case her son was the only person entitled to take the objection to her title, and that he was living under her protection. In March 1871, Ganpatráv was made a co-plaintiff on his own application, notwithstanding the opposition of the defendants, who filed a supplementary written statement in July 1871, in which they contended that Ganpatráv's interest was not affected by Ramábái's suit, and that Section 73 was, therefore, not applicable. I entertain but little doubt that, under these circumstances, the making Ganpatráv a co-plaintiff was an improper proceeding. Assuming, however, that Ganpatráv was properly made a party, it could only be on the assumption that Ramábái was henceforth suing on behalf of her son, otherwise there would clearly be a misjoinder of plaintiffs. Now the right of Ganpatráv, as son of Bháu Sáheb, was to recover possession of the lands in question on the expiration of the lease to defendants. That lease expired in 1854. Ganpatráv's right to recover possession of the lands would, therefore, have accrued at that date, and his right of action, owing to his not having come of age until 1865, would be barred in 1868. The suit, however, so far as it can be deemed to be based on Ganpatráv's title, must be deemed to have been instituted when he was made a co-plaintiff in 1871, and was, therefore, too late. This is apparent from the circumstance that the plaint had, previously to that date, been in Ramábái's own name as heir of her husband, and was expressed to be in her own behalf. Moreover, not having a certificate of guardianship, she was precluded, by the Minors Act XX. of 1864, from bringing

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a suit in her own name in respect of her son's property, nor could the making Ganpatráv a co-plaintiff in 1871 change the character of the suit, as it had existed, previous to that date, so as to defeat the statute. It was suggested by Mr. Shántarám that the suit might be regarded as having been brought in 1864, treating her now as a trustee for Ganpatráv, and he referred us to the case before the Privy Council, reported in 6 Calc. W. R. P. C. R. 45. There, no doubt, a suit brought by a widow in her own right was treated as having been continued as trustee for her adopted son after the date of adoption. There was, however, no question of the statute in that case, but merely whether the widow could be deemed as having any title to recover in the suit after the adoption, and the Court held that she had, holding that she must be deemed to be suing as a trustee for her adopted son. In dealing, however, with the question of the statute of limitations, which arises in this case, it is plain that Ramábái could only be considered as suing as a trustee for her son, from the time when Ganpatráv was made a co-plaintiff with her.

We are obliged, therefore, to hold that the suit was barred, and the decrees of the courts below must, accordingly, be reversed with costs on special respondents throughout.

PINHEY, J.:—This suit was instituted, in 1864, by Ramábái Sáheb, widow of Bháu Sáheb Tásgánvkur, to recover possession of certain property in the possession of the defendant Gopál Káshi, and said to have been leased to the defendant in 1847 by the plaintiff's deceased husband.

Ramábái sued in her own right as widow and heir of her late husband. She did not claim the property on behalf of her infant son, nor did she mention that she had any son. Moreover, as she had not been appointed administratrix of her infant son's property under Act XX. of 1864, she was not competent to maintain or institute this suit on her son's behalf.

She admits that she had a son, Ganpatráv, born to her in 1849. It is clear, therefore, to my mind that this suit was

1875. not maintainable by Ramábái either for herself or for her infant son, and I am, therefore, of opinion that the suit should have been dismissed.

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But in 1871, that is nearly seven years after the suit was filed, and when Ganpatráv was 22 years of age, he was allowed to become a party to the suit, and was made by the Subordinate Court a co-plaintiff with Ramábái. I am of opinion that it was not competent to make Ganpatráv a co-plaintiff in the suit, either under Section 73 of the Code of Civil Procedure or under Section 20 of Act XX. of 1864, and that, therefore, his name should be removed from the record. Ramábái, by her own showing, had no cause of action, and it was not, in my opinion, competent to Ganpatráv, seven years afterwards, to come into a suit, which was bad in itself, and ought to have been dismissed years before, and import into the suit a cause of action which should date back from the date on which an unmaintainable plaint was filed by Ramábái.

Again, up to 1871, when Ganpatráv was made a co-plaintiff, there was no cause of action before the Court on which the Court could award against the defendant. If Ganpatráv had any cause of action against defendant, he must be held to have asserted it first in 1871, when he became a plaintiff on the record, for he cannot be said to have derived any right through Ramábái, who up to that time was the sole plaintiff on the record. But in 1871, Act XIV. of 1859 was the law of limitation, and under this Act, his claim was barred. It is admitted by the pleaders on both sides that Ganpatráv's claim was barred by limitation, if Act XIV. of 1859 applies to it, and if his claim dates from the time that he became a party to the suit.

And, therefore, I also think the decrees of the courts below should be reversed, and the claim dismissed with costs throughout.

[ORIGINAL CIVIL JURISDICTION.]

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February 22.*Suit No. 685 of 1873 (Appeal No. 259.)*

HARIDA'S PURSHOTAM	}	(Original Defendants)
and others.....		
		lants.

HENRY GAMBLE.....(Original Plaintiff) Respondent.

English law applicable to Hindus—Insurance—Valued policy—Over-valuation—Subrogation—Practice—Points raised on appeal not taken in the Court below—Civil Procedure Code, Sections 351 and 353—Costs.

Where the defendants, underwriters of a policy of insurance on goods on board a vessel bound from Bombay to Calcutta, were Hindus, but no principle of Hindu law was applicable, the parties having selected the English language for the expression of their contract, *Held* that the case was to be determined in accordance with the principles of English law.

A valuation of salt, based on the loss which the owner may possibly incur on account of the bonds in respect of the salt passed by him to the Government, though greatly in excess of the real value of the salt, is not such an over-valuation as amounts to proof of fraud.

Where, in a valued policy of insurance, the goods insured were valued at an amount greatly in excess of their real value, which amount was intended to include the amount in which the insured was liable to Government on account of bonds executed by him in respect of the goods insured, and after loss of the goods Government elected not to enforce the bonds, *Held* that the under-writers were entitled to be subrogated in the amount of the bonds, and were liable to the insured only for the real value of the goods, together with a fair profit.

The Appellate Court will not remand a case for re-trial on a point not raised in the court below, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the Appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondent's costs of appeal.

THIS was an appeal argued before BAYLEY and GREEN, JJ., from a decision of Sir Charles Sargent, J.

Scoble, A. G., and Farran, for the appellants.

Latham and Purcell for the respondent.

The facts of the case and the arguments of counsel are fully stated in the following judgment of the Appellate Court delivered by

BAYLEY, J. :—This was a suit brought by Mr. Henry Gamble as Official Assignee of the estate and effects of Ratanji

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Edalji Bottlewállá, an adjudicated insolvent, to recover Rs. 11,000, being the amount for which the defendants underwrote in Bombay a policy of insurance in the English language and form, dated 5th June 1872, the insurance being effected by the insolvent's agent, Mancharji Dorábji, for Rs. 40,000, and declared to be upon 800 tons of loose salt on board the ship *Regina*, bound from Bombay to Calcutta, valued at Rs. 50 per ton, free of particular average, unless stranded, sunk, or burnt.

The plaintiff alleged that the ship with the said goods on board thereof sailed on the said voyage on or about the 7th June 1872, and that whilst the ship was proceeding on the voyage and during the continuance of the risk, the goods were, by the perils so insured against, wholly lost. The plaintiff further stated that Ratanji Edalji Bottlewállá was adjudicated an insolvent on 15th October 1872, and that, by an order of that date, his estate was vested in the plaintiff, Henry Gamble. It then alleged that all conditions were fulfilled, all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said sum of Rs. 11,000 by the defendants, but that they had not paid the same. The plaintiff also claimed interest at 9 per cent. per annum from the 1st March 1873 till payment.

The defendants, by their written statement, denied their liability to pay the plaintiff any part of the money claimed in the plaintiff. They admitted that they subscribed the policy for the sum of Rs. 11,000, but did not admit that Ratanji Edalji caused himself to be insured as alleged. They denied that the goods mentioned in the policy were shipped as alleged, or that Ratanji Edalji was interested therein. They denied that the ship *Regina* sailed as stated, or that the goods were lost as alleged, and they lastly said, but without waiving the defences before stated, that after subscribing the policy they discovered that the valuation of the said goods contained in the policy was a valuation grossly in excess of the real value of such goods, and they stated that they would contend that the said valuation was fraudulent, and that they ought in no event to be held bound by such valua-

tion, the defendants saying that the maximum real value of the goods mentioned in the policy was Rs. 10,000.

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The suit came on for hearing before Sir CHARLES SARGENT on the 9th July 1874, when the following issues were framed :—

1. Whether Mancharji Dorábji was the agent of Ratanji Edalji Bottlewállá for the purpose of effecting the policy of assurance as stated in the plaint ?

2. Whether Ratanji Edalji Bottlewállá was interested in the goods mentioned in the plaint, as in the 4th paragraph of the plaint mentioned ?

3. Whether the valuation of the goods contained in the said policy was a fraudulent one ?

Mr. Macpherson, who, with the learned Advocate-General, appeared for the defendants, admitted the shipment of goods, the sailing of the ship, and the loss of the goods.

The policy of the 5th June 1872, with official translations of the Guzerathi writing in the margin, and of the six Guzerathi and three Márwádi underwritings thereto, a notice of the loss, dated 30th August 1872, and two letters of demand, dated 20th November 1872 and 6th September 1873, and a copy of the manifest, were put in evidence on behalf of the plaintiff; and Mancharji Dorábji, the agent of Ratanji Edalji Bottlewállá, and the person in whose name the policy had been effected, Mr. Thomas Lidgetter, who wrote the notice of the 30th August 1872, after news of the cyclone had arrived, in which the vessel is supposed to have been lost, and Rastamji Ratanji Edalji, son of the insolvent, were examined on behalf of the plaintiff.

After Mr. Macpherson had addressed the Court on behalf of the defendants, Mr. William Maidment, Assistant Collector of Salt Revenue in Bombay, and Harkisan Jivandás, a member of two firms in Bombay, which were extensive salt dealers, were examined on behalf of the defendants. The vesting order and copies of three bonds (to be presently noticed) were put in evidence for the defence. Mr. Latham, on behalf of the plaintiff, appears, from the learned Judge's notes,

1875. to have tendered evidence of the price of salt at Calcutta, after which the learned Judge found all the issues for the plaintiff, and gave judgment for the plaintiff for Rs. 11,000. with interest at 9 per cent. from the 1st March 1873 until judgment, with costs and interest at 6 per cent. upon the judgment-debt.

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Against such judgment the defendants appealed, their memorandum of appeal stating the nine following grounds:—

1. That the Judge erred in finding that the interest of Ratanji Edalji Bottlewállá in the salt insured by the policy was duly proved.

2. That he erred in finding that the salt was not fraudulently overvalued in and by the policy.

3. That he erred in not holding that the policy was vitiated by reason of the fraudulent overvaluation of the salt, and the plaintiff thereby precluded from receiving the amount claimed in this action.

4. That he erred in finding that the liability of the obligors under the bonds (Exhibits Nos. 1, 2, and 3,) could legally be included in the valuation of the salt.

5. That he erred in finding that the liability under the bonds was intended to be included in the valuation of the salt.

6. That he gave no weight to the fact that the bonds had not been enforced, and that the deposits made thereunder were refunded.

7. That he ought to have held that the plaintiff was not entitled to recover more than the actual value of the salt, as proved at the hearing of the suit.

8. That he ought to have passed judgment for the defendants with costs.

9. That the decree was contrary to equity, justice, and good conscience.

The appeal was argued before my brother GREEN and myself in December last by the Advocate-General and Mr.

Farran for the appellants, and by Mr. Latham and Mr. Purcell for the respondent. 1875.

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In answer to a question from the Court, it was stated by Mr. Latham that this was a specimen case, and that there was a consolidation rule as to other suits brought against the other underwriters to the policy of the 5th June 1872.

Upon reference to the proceedings, we find that on the 9th February 1874, by a Judge's order of that date, entitled in the suit, and in seven other suits brought by Mr. Gamble, as Official Assignee, against seven of the other underwriters, and numbered successively suit 678 of 1873 to suit 684 of 1873, both inclusive, it was, upon "reading the consent of Messrs. Macfarlane and Skipsey, attorneys for the plaintiff in all the abovementioned suits, and of Messrs. Manisty, Fletcher, and Smith, attorneys for all the defendants in the above suits, ordered that all further proceedings in such other suits be stayed until a decree should be made in this present suit, and that in case of an appeal by either of the parties herein all further proceedings in the other suits should be stayed until a decree should be made by the Appellate Court in this suit, the parties in such other suits undertaking to be bound and concluded by the judgment that should finally be made in this suit, unless the Court, whose judgment should form the judgment in this suit, should certify that such plaintiffs or defendants should not be bound thereby.

The present suit, therefore, virtually involves the right of the plaintiff, as assignee of the insolvent Ratanji Edalji Bottlewálá, to recover the aggregate amount underwritten by the different underwriters to the policy sued on, viz., Rs. 40,000.

Upon the argument before us it was contended on behalf of the appellants either (1) that there was such an overvaluation of the salt as to amount to fraud, in which case it was contended that the policy would be void; or (2) that the underwriters were entitled to be subrogated for the assured, in respect of the goods assured, to such an extent as to render them liable only for the actual loss sustained by the assured.

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The counsel for the respondent, on the other hand, argued (1) that the learned Judge was correct in holding that the liability of Ratanji Edalji Bottlewallá's agent, Manchharji Dorábji, on the bonds (Exhibits 1, 2, and 3,) might be taken into consideration by the assured in fixing the high value of Rs. 50 per ton of salt, that there were no circumstances to show fraud, and that the valuation could not be opened; and (2) that this Court ought not to entertain the question of subrogation at all, inasmuch as the point as to subrogation was admittedly not even mentioned during the hearing before Sir Charles Sargent.

We entertain, however, no doubt as to our power to consider and decide such point, Section 353 of the Civil Procedure Code having enacted that "when the evidence upon the record of the lower court is sufficient to enable the Appellate Court to pronounce a satisfactory judgment, the Appellate Court shall finally determine the case, notwithstanding that the judgment of the lower court has proceeded wholly upon some other ground."

Now, Manchharji Dorábji stated in his evidence in the court below that Rs. 5,600, being the total amount of deposit money at the rate of 4 annas per *maund*, paid by him in Bombay when he signed the bonds for the customs duty, was afterwards returned to him; and Mr. Maidment stated that no duty is paid on salt exported from Bombay to Calcutta. Rs. 3-4-0 duty per *maund*, he said, are payable at Calcutta, and that bonds are taken from exporters in Bombay, and a deposit paid at 4 annas per *maund*, that the deposit in the present case had been returned, and the bonds which are in a penal sum fixed at twice the rate of the Bombay duty, were not enforced in this case, Government having ordered the deposit to be returned after inquiry had been made.

There is no necessity for us to remand the case under Section 351 of the Civil Procedure Code for further investigation. We concur in the remarks of Sir Barnes Peacock, C.J., in *Fuzeelun Bebee v. Omdah Bebee and another* (a) that

(a) 10 Cal. W. Rep. 469 Civ. Rul., see p. 471.

“the object of the Act was that the Appellate Court should not remand cases when it has the materials for determining them itself. * * * The object of the Legislature was that litigation between the parties should come to an end as soon as it could consistently with justice.”

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It was, of course, further contended, on behalf of the respondent, that the underwriters were not entitled to subrogation at all.

It was stated by the learned counsel, who so ably argued the case before us, and, so far as we are aware, correctly stated, that there was no decision, either in England or in India, in which the main question argued before us had been expressly determined. It was, however, contended that upon the principles laid down in some of the cases cited, the appellants ought to have the Rs. 5,600 paid or credited to them, and that they ought to be relieved from any liability in respect of the three bonds which the obligees, viz., the Government of Bombay, have not caused to be enforced, and apparently have no intention of enforcing, seeing that after inquiry they have ordered the deposits paid on their execution, to be returned, and which deposits have been returned to Manchharji Dorábji, the principal obligor.

Upon the facts proved in the court below, it was contended before us for the appellants that, taking the cost price of the salt in Bombay, and adding thereto the maximum profit of 25 per cent. upon the sale of the salt in Calcutta, that being the maximum profit according to the evidence of Harkisan Jivandás upon salt exported from Bombay to Calcutta, the real value of the salt would be a little over Rs. 3,000; whilst Mr. Latham, on behalf of the respondent, did not urge that the salt could, at Calcutta, be worth more than about Rs. 7,000. Counsel on both sides, at the conclusion of the argument, agreed that, if necessary, evidence could be given either in this Court, or, in case of a remand, in the court below, of the value of the salt in Calcutta. The duty to which the 22,400 *maunds* of loose salt were liable in Bombay amounted to Rs. 40,600. Mr. Maidment, the Assis-

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tant Collector of Salt Revenue in Bombay, proved that no duty is paid on salt exported from Bombay to Calcutta, but that bonds are taken from exporters, the penal sum in such bonds being fixed at twice the rate of the Bombay duty. The three bonds (Exhibits 1, 2, and 3,) are for the respective penal sums of Rs. 36,250, Rs. 8,700, and Rs. 36,250, aggregating Rs. 81,200. The bonds respectively recite that Mancharji Dorábji is indebted to Her Majesty's Government of Bombay in the sums of Rs. 18,125, Rs. 4,350, and Rs. 18,125 (aggregating Rs. 40,600), being the excise duty on *maunds* 10,000, 2,400, and 10,000, in all 22,400 *maunds* of salt, which he has agreed and received permission from the Collector of Salt Revenue to remove from the salt pans in Taluka Trombay, for the purpose of exporting the same to Calcutta per ship *Regina*, and the condition of each bond is that if Mancharji Dorábji and his two sureties, or either of them, shall produce to the Commissioner of Customs, within four months after the date of exportation, a certificate showing that the afore-said quantity of salt has duly arrived and been landed at Calcutta, then the obligation is to be void and of no effect, but if they, or either of them, shall fail to produce to the said Collector of Salt Revenue, within the said period of four months, such certificate, whatever cause such failure shall arise from, whether the act of God or otherwise, then the obligation is to be and remain in full force and virtue.

Mr. Maidment stated that the amount of duty on the salt payable at Calcutta was Rs. 3-4-0 per *maund*; and on referring "to the Indian Tariff Act," passed by the Governor General of India in Council, No. XIII. of 1871, Schedule No. 42, we find that the import duty payable on salt imported from any place, whether within or without British India, into the territories under the Government of the Lieutenant-Governor of Bengal is Rs. 3-4-0 per *maund*, whilst the duty on salt imported into any other part of British India (except British Burmah) is Rs. 1-13-0 per *maund*.

The duty payable at Calcutta upon the 22,400 *maunds*, and which would amount to Rs. 72,800, would not, of

course, be payable, unless the salt had arrived there. The ship *Regina* having been totally lost during the voyage from Bombay, the obligors were unable to comply with the condition in each of the bonds: the bonds were in fact forfeited, and the Government of Bombay might, if they pleased, have enforced them. Although the policy might have been framed with more appropriate terms to expressly include the risk which Mancharji Dorábji undoubtedly incurred in case of the loss of the salt by the perils insured against, we agree with the learned Judge in the court below that such possible loss may have been the reason why the value was fixed so high as Rs. 50 per ton, and we concur with him in thinking that the valuation having apparently been made upon the principle that the risk on the bonds was included in the insurance, no fraud was shown, and that the policy cannot be opened on the ground that the sum inserted as the value of the salt was so outrageously large as to make it plain that the assured intended a fraud on the underwriters. Mr. Justice Willes, in his judgment in *Lidgett v. Secretan* (b) states that the result of the decisions in England, as well as in the United States, and, he believes, in North Germany, was that the value mentioned in the policy is a conventional sum not representing the real value of the vessel (or goods), but the sum to be paid by the underwriters in the event of a loss.

The next question for our determination is whether, under the special circumstances of this case, the underwriters are entitled to the benefit, which, owing to the Government of Bombay having returned the deposit, amounting to Rs. 5,600, and to their having virtually cancelled the bonds, the assured has undoubtedly received from such liberal action on the part of the Government.

The difficulty arises from the fact that the policy in question is a valued one. The defendants in the present suit are described in the plaint as Hindus, residing in Bombay, and the defendants in the seven consolidated suits appear, from their names, to be also Hindus. This being a matter of contract in which the defendants are Hindus, has to be

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(b) L. R. 6 C. P. 616, see p. 628.

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determined in this Court under clause 29 of the old Supreme Court Charter of 1823, continued in force by clause 18 of the Letters Patent of 1862 and clause 19 of the Letters Patent of 1865, by the laws and usages of the Hindus, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a native court, as pointed out by Sir Joseph Arnould in *Davlatrámi Shrirámi v. Bulákidás Khemchand* (c).

It was not, however, contended before us, nor are we aware, that the Hindu law contains anything which might be considered applicable to the point now under consideration. The policy on which this suit is brought is in English, with which language the underwriters were apparently unacquainted, as of the nine underwriters six wrote their subscription to it in Guzerathi and three in Márwádi. In the absence of any Hindu law or usage the present case must, we conceive, be determined according to the principles of English law, and more especially as the parties to this policy have selected the English language for the purpose of expressing their contract. In *Dvárkadás Lalubháí v. Adam Ali Sultán Ali* (d), which was a special appeal from the District Court of Surat, the suit being brought on a policy of insurance on goods shipped on board a native vessel for a voyage from Surat to Kurrachee, Sir Richard Couch, C. J., and his learned colleague decided the case upon the English authorities as to constructive total loss. In *Martin v. Lee* (e), which was an appeal from Lower Canada, the question being as to the construction of the word "children" in a will made in the English language by a married woman domiciled in Lower Canada, the Lords of the Judicial Committee, without, however, giving an express decision upon the point, said:—"It may well be that this will, having been written in the English language, the proper mode of dealing with the case may have been for the courts in Canada to ascertain what, according to the English law, was the meaning of the word 'children' as used in the will, * * * resorting to

(c) 6 Bom. H. C. Rep. O.C.J. 24.

(d) 3 Bom. H. C. Rep. A.C.J. 1.

(e) 14 Moore P. C. 142.

the foreign" (*i.e.*, English,) "law or language for the purpose of deciding the meaning of the words used in the will" (p. 155).

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What, then, have been the decisions in England (in India the point does not appear as yet to have arisen) upon this branch of the law of Marine Insurance? Under what circumstances, and to what extent, has the doctrine of subrogation been held to apply? And do such cases, or the principles to be deduced from them, afford any guide for the determination of the present case?

The subrogation, *i. e.*, the substitution of the underwriters in the place of the assured, entitling them to all the rights of the latter, has, in cases of total loss, long been a well established principle in the law of marine insurance. The doctrine of abandonment in cases of constructive total loss is a familiar instance of that principle.

Lord Abinger, C.B., in delivering the celebrated judgment of the Court of Exchequer Chamber in *Roux v. Salvador* (*f*), said: "The history of our own law furnishes few, if any, illustrations of the subjects of abandonment before the time of Lord Mansfield. That great Judge was obliged to resort to the aid of foreign codes and to the opinion of foreign jurists for the rules and principles which he laid down in the leading cases of *Goss v. Withers* (*g*) and *Hamilton v. Mendez* (*h*). But even those principles are, comparatively speaking, of modern date." After referring to the Code of Florence, dated 1523, and to the decisions of the rota of Genoa as containing no allusion to abandonment, Lord Abinger proceeds thus:—"But when assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confirming the object of the contract to a strict indemnity;" and, after referring to the continental law upon the subject, he proceeds: "But what-

(*f*) 3 Bingh. N. C. 266.

(*g*) 2 Burr 63.

(*h*) 1 W. Blackst. 276.

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ever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests and the consequences which result from it. It is, indeed, satisfactory to know that, however the laws of foreign States upon this subject may vary from each other and from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law." He then states several cases of loss, and points out that if the assured, upon the information he has received, elects to treat the case as one of total loss and demand the full sum insured, "as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value."

In *Brotherston v. Barber* (i), the vessel insured was captured by an American Privateer off the coast of Ireland, on the 19th of April 1814. Notice of abandonment was given on the 25th of April, and the recapture and restoration of the ship took place before action brought. It was held by the Court of King's Bench, a partial loss having been sustained, that the assured could only recover for a partial loss. Mr. Justice Bayley said: "This is a contract of indemnity only. The ship was captured in the course of her voyage. Now, capture is an event which may or may not terminate in a total loss. If it continue and terminate in a total loss, the assured will be entitled to his full indemnity,

(i) 5 M. and Selw. 418.

but if the capture be only temporary and the loss partial, it would be against the spirit as well as the letter of the contract to hold the underwriter bound to take to the subject-matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the assured to demand more than the safety of the thing insured? It is said that abandonment gives this right by closing the transaction between the underwriter and assured. But notice of abandonment is no more than a proposal on the part of the assured, which the underwriter may accept, and then there will be a new agreement between them, binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary and cannot amount to a total loss, if by subsequent events it has become otherwise at the time of action brought."

Mr. Justice Holroyd, in the course of his judgment, said: "It is clear that a policy of insurance both in its object and form" (he was speaking apparently of an open policy), "is merely a contract of indemnity. It contains no stipulation respecting abandonment. * * * Abandonment has its origin from the contract being a contract of indemnity. But it is apparent that if the assured might abandon at his pleasure, he might be a gainer to a much greater extent than the value of the loss, which is inconsistent with a contract of indemnity. What, then, is the loss which the assured in this case have sustained? It is a loss arising out of the capture of the ship, and if the ship had been conveyed *infra-præsidia* of the enemy and condemned, this loss would have been total; but as events have made it at the time when the action was brought, it is but a partial loss. I am not aware that in any case a plaintiff can recover larger damages than what he has sustained at the time of bringing the action."

An abandonment, although generally in writing, may be parol: *Parmeter v. Todhunter* (j), *Read v. Bonham* (k).

(j) 1 Campb. 541.

(k) 3 Brod. and Bingh. 147.

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Where the underwriter has accepted the notice of abandonment, or where the totality of the loss continues down to the commencement of the action, a notice of abandonment, if originally valid, has, as Sir Joseph Arnould, in his Treatise on Marine Insurance, Vol. II., p. 1012 (2nd Edn., 1857,) states, precisely the same effect in England as everywhere else: "In such case" (he says) "it operates as a complete and effectual transfer of property from the assured to the underwriters, who, in the language of the continental jurists, are by virtue of it *subrogated* into the place of the assured (*par le délaissement, l'assuré subroge les assureurs en son lieu et place*). It has even a retrospective effect, and operates as an assignment of the property not only from the time when it was given, but from the moment of the loss which justified it, so that the underwriters are presumed to the extent of their respective subscriptions to have been the owners of the thing insured from the period of the loss. In a word, a valid notice of abandonment under the limitations already indicated has a retrospective effect, and does of itself without any deed of cession transfer the right of property to the underwriters to the extent of the insurance from the moment of the loss."

This view as to the retrospective operation of a valid abandonment from the moment of the casualty was held to be correct in *Cammell v. Sewell* (l) affirmed in the Exchequer Chamber (m).

In 2 Arnould on Insurance (2nd Edn.) p. 1011, it is stated that "the rule must now be considered as established by a long and uniform course of decisions (*Bainbridge v. Neilson*, 10 East. 329; *Patterson v. Ritchie*, 4 M. and S. 393; *Brotherston v. Barber*, 5 M. and S. 418; *Naylor v. Taylor*, 9 B. and Cr. 725; *Holdsworth v. Wise*, 7 B. and Cr. 794), that even although the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice and recover as for a total loss, if the thing insured be restored, before he commences his action in such a state that he may reasonably be expected to

(l) 4 Jur. N. S. 978.

(m) 6 *Idem*. 918.

take possession of it. In fact in English law, to use the words of Lord Ellenborough in *McIver v. Henderson* (n), 'The nature of the damnification at the time when the action is brought is to be regarded as the criterion of the right to recover as for a total loss; and if at that time what had antecedently been a total loss has, by subsequent events, ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered'."

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These cases, we think, throw much light upon the question now under consideration. In several of them, the policies sued on were valued policies. In *Bainbridge v. Neilson* (o) the ship *Mary* was valued at £6,000, and the second policy also sued on was upon the freight of the same ship valued at £4,000. In *Patterson v. Ritchie* (p), the policy was on goods valued at £14,000, on board the *Dispatch* from Liverpool to Quebec. In *Holdsworth v. Wise* (q), the policy was on the ship *Westbury*, valued at £1,800. And in *McIver v. Henderson* (r), the two policies sued on were on the ship *Tartar* valued at £3,000 at and from Liverpool to Sierra Leone.

They also show that underwriters may undoubtedly acquire rights over, and have the property in, the ship freight on goods insured transferred to them without any act or assent of their own, and that such rights and property may accrue to, and vest in, them long before they have paid, as on a total loss, the full amount of their subscriptions, and indeed before any action has been commenced against them to recover the sum for which they have underwritten. It is well to bear this latter feature in view, as it will prove that in the few authorities directly bearing, *eo nomine*, upon the point of subrogation, the underwriters paid in each case in the first instance for a total loss, and it was not until after such payment in full that the events happened to the benefit of which the underwriters, not the assured, were held to be entitled.

(n) 4 M. and S. 576, see p. 583.

(o) 10 East. 329.

(q) 7 B. and Cr. 794.

(p) 4 M. and S. 393.

(r) 4 M. and Sel. 576.

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As already noticed, the difficulty in the present case is caused by the policy on the 800 tons of loose salt being a valued one, the salt being "valued at Rs. 50 per ton."

In 1 Arnould on Insurance, p. 361 (we quote again from the 2nd Edition, which is the last one published entirely by Sir Joseph Arnould himself), it is stated that in cases of total loss the value in the policy has always been held as the conclusive standard of indemnity, citing *Shawe v. Felton* (s). "As a general rule," says the learned author, "the valuation fixes the amount of the insurable interest as between the parties, and can never, except in cases of fraud or excessive valuation, be set aside; but whether the loss be only total or partial remains the basis upon which the sum due to the assured in respect of the loss is calculated."

We think that Sir Joseph Arnould is quite correct in saying, as he does in a note to the above quoted passage, that the doctrine thus stated by him is conclusively established by the decision in the House of Lords in the year 1847 of the case of *Irving v. Manning* (t).

It was, however, decided by the Court of King's Bench in the year 1811, in the leading case of *Forbes v. Aspinall* (u), that the valuation in the policy, though it fixes the value of the interest, does not preclude the inquiry whether or not the whole of the interest, intended to be insured, and to which the valuation refers, has, in fact, been at risk. There the insurance was on freight at and from Hayti to Liverpool valued at £6,500, and it appearing that the vessel was lost off the coast of Hayti, when she had only taken in fifty-five bales of cotton, which formed but a small part of the cargo, intended to be shipped on board her, and on which the freight was valued, the court would not allow the assured to recover the whole amount of the valuation, but only such a proportion of it as the goods actually shipped on board bore to the full cargo intended to be loaded and on which the freight was estimated.

(s) 2 East. 109.

(t) 1 House of Lords Rep. 287.

(u) 13 East. 323; S. C. Tud. L. C. on Merc. and Marit. Law 185.

That case was argued by the most eminent counsel then at the English bar, and in a considered judgment delivered by Lord Ellenborough, C.J., the law is thus lucidly stated :—

“ The object of valuation in a policy is to fix, by agreement between the parties, an estimate upon the subject insured and to supersede the necessity of proving the actual value by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost in the case of the goods, adding thereto only the premium and commission, and, if he think fit, the probable profit; and in the case of freight he will not go beyond the amount of what the ship would earn with the premiums and commission thereupon. The valuation, however, in the case of goods looks to *all* the goods intended to be loaded * * * ; and if, by the perils insured against in a valued policy on goods, part only of the goods, intended to be covered, be lost, the valuation must be opened, and the assured can only recover in respect of that part. * * * If, for instance, the insurance be generally upon goods, and the goods, intended to be protected, be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship, by accident, takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against with those 100 on board, can it be contended that the assured shall recover to the full amount of the valuation, that is, for the whole 500 when he has lost only 100? * * * and yet to this extent the plaintiff’s argument in this case is carried. The proposition is monstrous. * * * The court, therefore, will look to very strong authorities before they yield to such a proposition.

“ It was pressed upon the argument that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede with this limitation, that is, provided there is a total loss by any of the perils insured against of

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1875. *the whole subject-matter of insurance to which the valuation applied, viz., of all the intended cargo of goods where the insurance was on goods, and of all the intended freight where the insurance was upon freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to inquire what was intended to have been included in that valuation, or, when he has ascertained that point, that he cannot reduce the sum below the valuation by proving that a part only of what was included in the valuation has been lost by a peril insured against, we deny the position when so extended."*

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In *Rickman v. Carstairs* (v), the same principle was acted upon in the case of a valued policy on goods.

In *Tobin v. Harford* (w), decided in 1863, and affirmed in the Exchequer Chamber (x), a policy of insurance for twelve months on ship and cargo, the ship being intended for the barter trade on the coast of Africa, contained a stipulation that "outward cargo should be considered homeward interest 24 hours after arrival at the first port or place of trade." By a subsequent clause, the policy was declared to be "on the ship valued at £2,000, cargo valued at £8,000 with liberty to increase the valuation of the homeward cargo." There was also liberty given to the insured "to discharge, load, unload, sell, barter, exchange, and trade" any part of the cargo. The ship arrived at a port on the coast of Africa, and there discharged one-third of her cargo, and, after a stay of more than 24 hours, proceeded towards other ports, in order to take in homeward cargo, and, before arriving at her next port of destination, she was totally lost. It was held that the insurers were not liable to pay the whole £8,000, but a proportion only. That the valuation in the policy was applicable to what was substantially a full cargo, whereas here there was not substantially a full cargo. It was also held that the proportion of the £8,000, which the underwriters were liable to pay, was to be ascertained by

(v) 5 B. and Ad. 651.

(w) 13 C. B. N. S. 791; S. C. 32 L. J. C. P. 134. (x) 34 L. J. C. P. 37.

finding the proportion of a full cargo which was on board at the time of the loss ; and if this proportion could not be found then the underwriters would be liable as upon an open policy underwritten for £8,000.

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It remains to notice the cases cited at the bar, in which the underwriters were subrogated in the place of the assured as regards claims made by the assured against third parties.

The earliest was a decision of Lord Hardwicke, C., in the year 1748, in *Randal v. Cockran* (y). The case is very shortly reported, and in the following words:—The King having granted general letters of reprisal on the Spaniards for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the Commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers, who thereupon brought the present bill.

The Lord Chancellor was of opinion that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner, but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie or compensation made for them, the assured stands as a trustee for the insurer in proportion for what he paid, although the Commissioners did right in avoiding being entangled in accounts and in adjusting the proportion between them. Their commission was limited in time ; they see who was owner, nor was it material to them to whom he assigned his interest, as it was in effect after satisfaction made.

That case was stated by the counsel for the respondent to be the only one in the books, to which we can scarcely assent. The principle on which it was decided, viz., that the assured ought not to be paid twice over in respect of a policy which is merely a contract of indemnity, has been repeatedly acted upon in England during the century and a quarter which has elapsed since Lord Hardwick's decision in favour of the underwriters in that case, and it is cited with no indication

(y) 1 Vesey Sen. 98.

1875. of disapproval by Sir Joseph Arnould in the three editions
 HARIDA'S of his Treatise to which we have had access : 2 Arnould on
 PURSHOTAM. Insurance, 2nd Edn. p. 1180, 3rd Edn. p. 867, 4th Edn.
 v. HENRY p. 864.
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In *Yates v. Whyte* (z) it was held that after abandonment for damage arising from collision, caused by the fault of another ship, the underwriters had the same right of action in the name of the assured against the owner of such ship as the assured himself had before abandonment, and might recover in proportion to the extent in which the ship was covered by the policy.

In *Miller v. Woodfall* (aa), Lord Campbell, C. J., in delivering the judgment of the Court, said :—"The abandonees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers, and although the contract of a shipowner does not run with the ship, it is well settled that, as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship. * * * The abandonee of the ship, like the purchaser, has a right to the whole of the freight pending at the casualty, although he could not claim freight paid or completely earned in a prior part of the voyage : *Stewart v. Greenock Marine Insurance Company*, 2 House of Lords Rep. 159 ; *The Scottish Marine Insurance Company of Glasgow v. Turner*, 1 Mag. Scotch Appeals 334."

In the *Quebec Fire Assurance Company v. St. Louis and another* (bb), an appeal from Lower Canada, and which turned upon the old law of France, it appeared that the parish church of Borecherville in Lower Canada having been, in great part, destroyed by a fire occasioned by the negligence of the servants of the respondents (St. Louis and another), and being at the time insured by a policy effected by the cure upon the church and sacristy, the cure and one of the marquilliers in charge, by a notarial instrument transferred to the appellants (the Quebec Fire Insurance

(z) 4 Bingh. N. C. 272.

(aa) 8 Ell. and Blackb. 493.

(bb) 7 Moore P.C. 236.

Company), who had granted the policy, in consideration of the payment by them of part of the amount of the damage sustained by the fire; the right to sue and claim from the respondents the amount so paid. The Judicial Committee of the Privy Council held that this constituted a valid subrogation of the debt due to the insurers in right of the fabrique according to the French law prevailing in Lower Canada.

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The judgment of the Judicial Committee was delivered by the late Lord Wensleydale, and at p. 316 proceeds thus: "But the learned counsel contended that an assured, by a policy against either maritime or terrestrial risks, is clearly within the equity of the rules, and has a similar right to require a subrogation at the time of the payment of the loss. The authorities cited in support of that position seem to us to establish that the assureds have that right." He then quotes Alauzel on Assurance, Pardessus, Quinault, Toullier, Emerigon, and Pothier "on Assurance," p. 248, "who" (Lord Wensleydale proceeds) "lays it down that in the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated to the rights of the assured to the contribution, which in such case must be made. These authorities are so consistent with justice, and founded upon so equitable a principle, that we have no difficulty in adopting them, and we do not think that any of these are shown to have been derived, as was suggested in argument, from the Code Napoleon, which is not in force in Canada. Assuming then that it is the old law of France that an assured may, on payment, require to be subrogated, two objections remain to be answered,"—which it is not necessary or material for us to notice here.

In the *North of England Iron Steam Ship Insurance Association v. Armstrong* (cc), decided in January 1780, the right of the underwriters, paying on a total loss, to be subrogated for the assured, was expressly decided. There a policy was effected for £6,000 on the steamer *Helton*,

(cc) L. R. 5 Q. B. 244.

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valued at £6,000. She was run down and sunk by another steamer, and the underwriters paid the owners the £6,000 as for a total loss. Afterwards £5,000 was recovered in the Court of Admiralty in respect of the *Hetton* against the owners of the other ship. The real value of the *Hetton* was £9,000, and there was no other insurance upon her. The Court held that as between the assured and the underwriters the value of the *Hetton* must be taken to be £6,000 for all purposes, and that, therefore, the damages recovered, which were in the nature of salvage, belonged entirely to the underwriters.

Cockburn, C.J., says (*dd*): "It is conceded by Mr. Smith that if there were this valued policy and an open policy, and the assured were first to sue upon his open policy, and recovered £3,000, he would not be afterwards entitled to recover on the valued policy the whole amount in that policy, but only £3,000, the difference between the amount recovered on the open policy and the amount of the estimated value on the valued policy. So, again, it must be conceded that if this sum, by way of damages, had been recovered first from the owners of the vessel which caused the damage, the underwriters upon this valued policy could not have been compelled to pay to the assured the whole of the sum insured, because the value of the vessel as between them must always be taken to be the amount at which it is stated in the policy. * * * * It has always been considered a settled rule in insurance law that where there is a total loss, the underwriters, who pay upon a total loss, whether it is actual or whether it is constructive, are entitled to anything that remains of the vessel, and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. * , * * It is only because it is a valued policy that these difficulties present themselves."

There are, no doubt, expressions in the judgments of the learned Judges in that case, which have a tendency to support the arguments adduced to us on behalf of the respondent,

but we think they must be taken to have reference to the facts then before the Court of Queen's Bench.

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The case of *Bruce v. Jones* (*ee*), decided in 1863, is an important one, and shows, as does also the already cited case of *Tobin v. Harford* (*ff*) affirmed in the Exchequer Chamber (*gg*), that even since the decision in *Irving v. Manning* (*hh*), the principle of indemnity is by no means to be disregarded in the case of a valued policy. There the plaintiff, a ship-owner, brought an action against one of the underwriters to a policy on the ship, valued in the policy at £3,200, to recover the defendant's share for a total loss. At the trial it appeared that the plaintiff had effected three other policies of insurance on the same ship, in which she was valued at £3,000, £3,000, and £5,000, respectively, and had received on the three last mentioned policies the sum of £3,126-13-6.

Mr. Justice Willes, who tried the cause at the Liverpool Assizes, a very high authority upon all questions of commercial law, directed the Jury, with respect to the measure of damages, that insurance was a contract of indemnity, and that for the purposes of that action, and as between the plaintiff and the defendant, the value agreed upon and stated in the policy must be taken to be the real value of the ship, viz., £ 3,200, and that if the plaintiff was entitled to recover in respect of a total loss, he would be entitled to be indemnified to that amount; that the sum the plaintiff had already recovered on the other policies must, therefore, be deducted from such value, and the plaintiff would thus be entitled to recover from the defendant in that action the difference of those sums. The jury found a verdict for the plaintiff for the difference so estimated, viz., £73-6-6. A rule *nisi* having been obtained for a new trial on the ground of misdirection as to the measure of damages, the court, consisting of Pollock, C.B., Martin and Channell, BB., after argument, decided that the direction of Mr. Justice Willes had been

(*ee*) 1 H. and C. 769.(*gg*) 34 *Idem* 37.(*ff*) 32 L.J.C.P. 134.(*hh*) 1 House of Lords Rep. 287.

1875. quite right, discharged the rule, and refused leave to appeal to the Exchequer Chamber.

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Now, what are the facts in the present case? The ship *Regina* having sailed from Bombay on or about the 10th June 1872, is believed to have foundered, with all hands on board, in the cyclone that occurred soon afterwards in the Bay of Bengal. Notice of the alleged total loss was given to the underwriters by the letter of the 30th August 1872 (Exhibit B.)

On the 15th October 1872, Ratanji Edalji Bottlewállá, the owner of the salt, and on whose behalf the policy had been made, was adjudicated an insolvent; and on the same day a vesting order was made (Exhibit F), vesting his property in the plaintiff, Mr. Gamble. It was stated before us by the Advocate General, and not denied by the counsel for the respondent, that the deposit upon the three bonds, amounting in the aggregate to Rs. 5,600, was repaid by the Government of Bombay and the bonds virtually cancelled on the 3rd July 1873. The plaint in the present suit was filed on the 30th September 1873.

What then were the rights of the plaintiff as the assignee of Ratanji Edalji Bottlewállá on that day? for to quote again the passage in 2 Arnould on Insurance, p. 1011, "In English law the nature of the damnification at the time when the action is brought, is to be regarded as the criterion of the right to recover as for a total loss, and if, at that time, what had antecedently been a total loss has, by subsequent events, ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered."

The salt insured had, by the perils insured against, been totally lost, but not salt of anything like the value of Rs. 40,000, the amount at which it was valued in the policy. Taking the highest estimate suggested in the argument before us by the counsel for the respondent, the utmost value of the salt at Calcutta could not have been greater than Rs. 7,000. We have expressed our opinion that the assured was justified in adding the possible risk

upon the bonds, at least that in so doing he rendered what otherwise would have been a grossly exorbitant and fraudulent valuation a fair and legitimate one. It can scarcely, we think, be doubted that, if the risk on the bonds was not a motive for the high value being fixed, a valuation at about six times the value of the salt at Calcutta must certainly be considered as so preposterous, so grossly exaggerated, as to furnish conclusive evidence of fraud : *Ionides v. Pender* (ii).

Had Government enforced payment of the bonds, either in whole or in part, we think that the underwriters would have been liable, upon this policy, to the amount which the obligors would have been thus legally called upon to pay under the bonds. But a little more than two months before the commencement of the present suit, the Government elected to treat the three bonds as cancelled, and returned to Mancharji Dorábji, the principal obligor, the whole of the deposit paid upon the execution of the bonds in May 1872.

The "whole subject-matter of insurance to which the valuation applied," to borrow the language of the Court in *Forbes v. Aspinall* (jj), what was intended to be and what was in fact included in the valuation, was the 800 tons of loose salt and the risk on the bonds. If it was not so, then the policy was void on the ground of an exorbitant and fraudulent valuation. Assuming, as we think we are bound to do, that such was the whole subject-matter of insurance, the assured's agent, Mancharji Dorábji, at the time of the filing of the present suit, had been freed from his liability in respect of the bonds, and the plaintiff, the assignee of the owner and shipper of the salt, cannot, we think, be entitled to recover from the underwriters, as for a total loss, when, so far as the bonds are concerned, there was not, at the commencement of this suit, any loss, either total or partial. Suppose that the Government had not returned the Rs. 5,600 deposit when they did, if the underwriters had in the first instance paid the Rs. 40,000 for which they underwrote, and if the Government, after enforcing the bonds, and after having been paid their full value, had, of their own mere

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motion, or upon receiving instructions from the Government of India or the Secretary of State, returned the amount so recovered upon the bonds to the assured or to his principal, would the insolvent or the plaintiff have been allowed to have retained, for his own benefit, such moneys as well as the whole Rs. 40,000 paid by the underwriters? We think clearly not, and that upon the authority of the cases we have cited, such moneys returned by the Government would have vested in the assured as trustee for the underwriters, or that, in other words, the underwriters would have been subrogated to the rights of the assured to the extent of such moneys so returned to him. We are unable to distinguish in principle such case from the present, and bearing in mind the doctrine of abandonment, and that under a valid notice of abandonment, underwriters may and unquestionably do acquire rights in the property insured before they are called upon to pay as upon a total loss, and that, as already pointed out, the subsequent restoration of the property defeats the right of the assured, even in the case of a valued policy, to insist on his notice of abandonment, we think that it would be contrary to decided cases, and to the principles to be deduced from them, as well as contrary to equity and justice, to allow the plaintiff to recover the whole Rs. 40,000 as for a total loss when the assured had, two months before the commencement of the present suit, by an act of bounty on the part of the Government of Bombay, been virtually released from all liability on the bonds, the possible liability upon which bonds alone prevented the valuation being excessive and fraudulent.

To quote the words of Lord Mansfield, C.J., in *Hamilton v. Mendez (kk)*, where the ship (which was valued in the policy at £1,200), after capture, after notice of abandonment which the underwriters refused to accept, and before action brought, was brought into the port of London, the ship having received no damage from the capture, and the cargo was delivered to the freighters, who paid full freight "the plaintiff's demand" (said Lord Mansfield) "is for an

(kk) 2 Burr, 1198, see p. 1210.

indemnity. His action then must be founded on the nature of his damnification as it really was at the time of action brought. It is repugnant, on a contract of indemnity, to recover as for a total loss when the final event has determined that the damnification is in truth an average loss."

The decree, therefore, in the court below, which was based upon the assumption that the assured suffered a total loss to the extent of the whole Rs. 40,000 insured by the underwriters, cannot stand, and must be reversed, and in lieu thereof a decree must be passed for such sum as will represent the value of the salt, with the fair profit thereon, had it reached Calcutta. We do not think that the Rs. 5,600, returned to Maṇcharji Dorábji, was money had and received to the use of the underwriters, or that they are entitled to any part of it as against the insolvent or his assignee, the present plaintiff.

We will, if the parties cannot agree to the amount, take evidence ourselves of the value of the salt at Calcutta, and so avoid sending the case down to the court below.

We think that the order of the lower court as to costs ought not to be disturbed; and as the point, upon which we decide this appeal, was not put forward in the written statement, or even alluded to during the hearing before Sir Charles Sargent, we think that the appellants must pay to the respondent his costs of this appeal as well as their own.

As the sum claimed in the present suit and underwritten by the appellants, viz., Rs. 11,000, will more than cover the amount which, in our opinion, the plaintiff can recover upon the policy, we propose, subject to anything which we may hear from counsel, that as the seven consolidated suits brought against seven of the eight other underwriters will doubtless fail, the same should, in accordance with the Judge's order, dated the 19th February 1874, be either dismissed or judgment be passed in favour of the defendants in each of such suits, numbered 678 to 684 of 1873 (both inclusive), each party thereto bearing his own costs.

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The defendants in those suits must pay to the defendants and appellants in the present suit their rateable contribution towards the amount which will be hereafter found due by the present defendants and appellants to the respondent as well as their contribution towards the plaintiff's and the defendants' and the appellants' costs of the hearing of the present suit in the court below, and the costs now ordered to be paid by the defendants and appellants in this appeal.

Note.—It was subsequently agreed between the parties that Rs. 5,000 should be taken as the value of the salt with a fair profit on it, had it reached Calcutta, and the decree of the Appellate Court was accordingly drawn up, reversing the decree of the court of first instance, in favour of the plaintiff and respondent for the sum of Rs. 5,000, being the sum agreed by counsel for the appellant and respondent to be the amount of the liabilities of the underwriters on the policy in the plaint mentioned according to the principle deemed applicable by the Appellate Court, and ordering the dismissal under the provisions of Section 110 of Act VIII. of 1859 of the seven suits mentioned in the Judge's order of 19th February 1874, and ordering the defendants in each of such suits to pay to the plaintiff the sum of Rs. 125, which the plaintiff had consented to take in lieu of his taxed costs of such suits, and ordering the defendants in this and each of such seven suits to pay to the plaintiff rateably and in proportion to their respective subscriptions the costs of the plaintiff in this suit in both courts, and all costs in the seven other suits, and to bear rateably and in proportion as aforesaid the taxed costs of all the defendants in the said suits.

[APPELLATE CIVIL JURISDICTION.]

1875.
March 10.*Regular Appeal No. 73 of 1872.*

PA'RAKH GOVARDHANBHA'I HARIBHA'I and LALLU HARIBHA'I, owners of the firm of GOVARDHANBHA'I LAL- LUBHA'I	}	Plaintiffs and Appellants.
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RANSORDA'S DULABHDHA'S, owner of the shop (or firm) conducted in the name of SHA' NATHUBHA'I RANSORD	}	Defendant and Respondent.
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*Act XXI. of 1848—Bombay Act III. of 1865—Hindu Law—Wagering
contracts—Agency—Partnership.*

Act XXI. of 1848 simply annuls all contracts by way of wagering, and prohibits any suit in respect of them, but does not declare them to be unlawful; and neither by the provisions of Act XXI. of 1848 nor by Hindu law is the agent of a wagerer precluded from maintaining against the latter a suit for moneys paid by the agent to the other wagerer, or his agent, in respect of the loss of the wager, nor from recovering fees and brokerage due to him as agent in effecting, or for services in connection with, the wagering transaction. *Moteelal Heeralal v. Jumadas Umrootlal and another* (2 Borr. Rep. 676) overruled.

Bombay Act III. of 1865 has not a retrospective force, and, therefore, applies neither to agreements collateral to wagering contracts, entered into prior to its coming into operation, nor to interest subsequently accruing due on such agreements.

Where the parties to an agreement (prior to the coming into force of Bombay Act III. of 1865), collateral to a wagering transaction, stand to each other in the relationship of partners, and not merely of principal and agent, they are severally liable for contributions, proportionate to their several shares, towards the losses incurred by the partnership in respect of such wagering transaction.

THIS was an appeal from the decision of Bholánáth Sára-bháí, First Class Subordinate Judge of Ahmedabad, in original suit No. 742 of 1867.

The facts of the case fully appear from the judgment of the Court.

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Leith (with him *Shántarám Náráyan* and *Vináyak Harichand*) for the appellants.

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Starling (with him *Dhirajlál Mathurádás*, Government Pleader,) for the respondent.

Cur. adv. vult.

WESTROPP, C.J. :—The plaintiffs claim from the defendant, as sole member of the firm of *Shá Nathubháí Ransordás*, a balance of Rs. 15,699-8-5, alleged to be due in respect of various dealings in cotton, opium, &c., between the plaintiffs and that firm.

With the single and insignificant exception of an item of "Rs. 59-1-0 debited on account of insurance," the defendant denies that any of the transactions sued upon were with the firm of *Shá Nathubháí Ransordás*. That firm he alleges to consist of several partners, none of whom, except the defendant, have been made parties to the suit. Any dealings, other than the item of Rs. 59-1-0, which the defendant had with the plaintiffs, he alleges to have been *Sattá* transactions, i.e., time-bargains, falling within Act XXI. of 1848, and carried on by the plaintiffs not simply as his agents, but as partners with him in his capacity as an individual, and not on behalf of, or with the firm of, *Shá Nathubháí Ransordás*.

Putting aside the item of Rs. 59-1-0, both parties concur in regarding the defendant alone as the person concerned with the plaintiffs in the transactions, the subject of this suit. The parties, it is true, arrive at that conclusion by different roads, inasmuch as the plaintiffs say that he is so because they dealt with the firm of *Shá Nathubháí Ransordás*, and that the defendant is the sole member of that firm, whereas the defendant avers that he alone is the person concerned with the plaintiffs in those transactions, inasmuch as they were dealings with the defendant as an individual, and not with his firm of *Shá Nathubháí Ransordás*.

Whichever of these two reasons be the true one, it is evident that under neither hypothesis would it have been a

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proper course to have made the alleged partners of the defendant in the firm of Shá Nathubháí Ransordás parties to this suit in respect of any of the transactions sued upon by the plaintiffs other than the item of Rs. 59-1-0, and for the sake of that item alone we do not understand that the plaintiffs wish to amend their plaint by adding as parties to this suit the persons alleged by the defendant to be his partners in the firm of Shá Nathubháí Ransordás. It would indeed have been imprudent to do so, because if it turned out either that the defendant expressly contracted on his own behalf alone with the plaintiffs in respect of the other items, or that, although he may have professed to enter into those contracts on behalf of the firm of Shá Nathubháí Ransordás, yet the other members of that firm did not authorize him to engage in such transactions, nor did such transactions come within the proper scope of the business for carrying on which the partnership firm of Shá Nathubháí Ransordás was established, the defendant alone would be liable in respect of them, and the plaintiffs would have exposed themselves to payment, to the partners other than the defendant, of their full costs, and could not save themselves therefrom by establishing against them the item of Rs. 59-1-0 inasmuch as it would be a misjoinder to have associated in one and the same suit that item, which affected the firm, with the other items, which, on the present hypothesis, affected only the defendant in his individual capacity. In that case, moreover, the plaintiffs might find it difficult to establish a right to have the costs, which they might be compelled to pay to those partners, over against the defendant; for he has, throughout this suit, denied that the transactions, other than the item of Rs. 59-1-0, were matters to which the firm of Shá Nathubháí Ransordás were privy.

The case of the plaintiffs, as presented to the court below, was that they acted in the transactions, alleged by the defendant to be *Sattá* transactions, as agents, and not as wagerers; that in short the wagers, if the transactions were wagers (which the plaintiffs denied them to be), were wagers between the defendant (under his commercial description or

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style of Shá Nathubháí Ransordás) and third parties, and not between him and the plaintiffs, and consequently that Act XXI. of 1848 did not apply to this suit. To that question of agency the Subordinate Judge mainly directed his attention, and held that such agency was not proved. He also held that the transactions were *Sattá* transactions. Assuming, but not deciding, that he was right on both points, we must point out that the defendant alleged that he did enter into *Sattá* transactions with the plaintiffs, and that the latter were not his agents, but his partners in those transactions, that is to say, were joint wagerers with him in timé-bargains with third parties. The Subordinate Judge seems to have quite overlooked the legal effect of the case as thus put by the defendant himself, and so apparently did his professional advisers in the court below. The defendant denied that the plaintiffs were his agents, thinking probably that he might thus evade coming within the scope of the decisions of the Supreme and High Courts, which held that the agent (usually a shroff) of a wagerer might maintain against the latter a suit for moneys paid by the agent to the other wagerer or his agent in respect of the loss of the wager, and might also recover fees and brokerage due to him as agent in effecting, or for services in connexion with, wagering transactions. Such was the case of *Jorávèrmal Sivolál v. Bèrármji Dádábháí*, decided, after due consideration, by Sir M. Sausse, C.J., in the Supreme Court, on its Plea Side, on the 14th of April 1859. It was an action of assumpsit to recover Rs. 11,001-8-1, being the balance of an account due from the defendant to the plaintiffs. The items on the debit side of the account consisted of payments, made by the plaintiffs on account of, and for the defendant, in satisfaction of losses on wagers made by the defendant in the names and through the agency of the plaintiffs, and of commission or brokerage due to the plaintiffs as such agents of the defendant. The wagers had been all entered into subsequently to the passing of Act XXI. of 1848, and were upon the average prices of opium realized at the Government sales of that commodity at Calcutta in 1857 and 1858. The commission or brokerage

was for effecting those wagers. Beside pleas of non-assumpsit, payment and fraud (which were traversed by the plaintiffs), the defendant pleaded certain special pleas, apparently intended to show the circumstances, under which the payments were made, and the brokerage, &c., sought to be recovered, and that, either by Act XXI. of 1848 or by Hindu law, the plaintiffs were debarred from recovering those payments or the brokerage, &c. To those special pleas the plaintiffs both specially and generally demurred. I contended on behalf of the plaintiffs that the special pleas were not only bad on special demurrer as being informal and unintelligible, but also were bad in substance, and, therefore, open to general demurrer, because the contracts sued on were not wagering contracts, but contracts collateral to them, on which a suit would lie, inasmuch as wagering contracts were only annulled and not rendered illegal by Act XXI. of 1848. Mr. Lewis, A.G., for the defendant contended, 1st, that Act XXI. of 1848 was applicable to contracts collateral to wagering contracts as well as to wagering contracts themselves, and in fact rendered the latter illegal, which, being so, tainted the collateral contracts with the same illegality. 2ndly, that, at all events, by Hindu law, all wagering contracts were illegal, and for this he cited 2 Borradaile 415, 621, 1st Ed. (a). As to the special pleas, the Chief Justice said that there were "strong reasons for regarding them as bad on special demurrer for informality and unintelligibility, but that he would not decide the case on that ground." I have a correct manuscript note of the judgment made at the time of its delivery, which, as the case has not been reported, it may be useful now to quote. He said: "Assuming those pleas to be regular in form and clear in their meaning, and further assuming that meaning to be that which it has been argued to be by the defendant's counsel, and viewing them in the manner most favourable to the defendant, those pleas seem to me to be bad on general demurrer. Treating those pleas either as stating that the plaintiffs had paid moneys for the defendant to third parties on losses by the defendant in respect of

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(a) 455, 676, Ed. of 1862.

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wagering contracts entered into between him and such third parties, or that the moneys sought to be recovered by the plaintiffs in this action are for commission or brokerage fees in respect of such contracts effected by the plaintiffs for the defendant with third parties, I think that those pleas would be bad on general demurrer. Act XXI. of 1848 of the Indian Legislature is analogous to the English Statute 8 and 9 Vic., C. 109, S. 18, from which the Indian Act is borrowed. That Statute and the Indian Act make all agreements by way of gaming or wagering null and void, and prohibit any suits in respect of such contracts. Neither the Statute nor Act declares such contracts unlawful, but merely annul them. There has been always a distinction preserved between cases, in which the Legislature declares a contract to be unlawful, and cases in which the Legislature has declared a contract to be null and void, and prohibited the parties to it from suing upon it. That distinction has been very clearly upheld with respect to the English Statute 8 and 9 Vic., C. 109, S. 18. Several cases in point have been cited by Mr. Westropp for the plaintiffs. *Knight v. Cambers* (b) and *Knight v. Fitch* (c) appear to rule the present case. *Inchbald v. Cockerell* (d), and *Sims v. Harris* (e), are to the same effect (f). (Here Sir M. Sausse referred in detail to those cases and then continued thus :) "The case cited by Mr. Lewis, A.G. from 2 Borradaile's Reports 621 (1st Ed.), appears to have been treated both in this Court (g) and in the Privy Council (h) as no longer law, if ever law. The 5th and 6th pleas are applicable to the count in the plaint on the account stated. They seem to be bad for the same reasons as the 3rd and 4th. The demurrer must be allowed with costs as the authorities are quite clear on the subject." The case subsequently went to trial upon the other pleas, on which issues in fact had been

(b) 15 C. B. 562; S. C. 1 Jur. N. S. 525; 24 L. J. N. S. C. P. 121.

(c) 15 C. B. 566; S. C. 1 Jur. N. S. 526; 24 L. J. N. S. C. P. 122.

(d) 4 Jur. N. S. 693, Exch. (e) *Id. Ib.*, 72.

(f) See also *Fitch v. Jones*. 5 E. and B. 238

(g) *Opium cases*, Perry, O. C., 225, 227.

(h) *Dulubdas Pitambardas v. Ramlal Thakursidas*, Perry, O. C., 232; S. C. 5 Moore I. A. 127.

joined, and the plaintiffs, notwithstanding another struggle made for the defendant at the trial, obtained, on the 11th November 1859, a verdict against him for Rs. 11,001-8-1 (the amount claimed) and costs.

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The contracts, sued upon in that case and in the analogous cases upon the Stat. 8 and 9 Vic. cited in it, were the contract arising upon either the express or implied request of the principal that the agent should pay the amount of the losses incurred on the wagers for the principal, and the express or implied contract that the principal should remunerate the agent for his services as agent. The contracts sued upon were not the wagering contracts themselves, but contracts collateral to them. It may be gathered from the cases relied on by Sir M. Gausse, from his own decision, and from *Rosewarne v. Billing* (i), *Joseph v. Lutwyche* (j), and other cases, that the fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter, but on behalf of the former (the principal), amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions.

The decision in *Jorávermat Sivilál v. Dádábhái Berámji* has been followed in numerous instances in the Supreme and High Courts [of which unfortunately only one, *Tribhuvandás v. Motilál* (k), has been reported], and, except in the case of collateral contracts entered into or arising since Bombay Act III. of 1865 came into force, has never been departed from. The law, as laid down in that case, is still the law in all parts of British India other than the Presidency of Bombay, throughout which Bombay Act III. of 1865 is in operation. The only item in the account (the subject of this suit) of a date subsequent to the coming into force of Bombay Act III. of 1865 is one for interest. The 4th section of that Act expressly declares that the Act "shall not be construed so as to give it a retrospective effect." If, under such contract or usage as the plaintiffs may prove, they would

(i) 15 C. B. N. S. 316.

(j) 10 Exch. 614.

(k) 1 Bom. H. C. Rep. 34.

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have been entitled to interest upon the moneys due to them in respect of the collateral contracts before the Act came into force, they will be so still. To hold that interest upon moneys due on collateral contracts, *entered into or arising before the Act came into force*, ceased to run from its coming into force, would be to give to the Act a retrospective operation. Neither to collateral contracts of such date, nor to any claim for interest arising thereon, is Bombay Act III. of 1865 applicable. That Act was passed to supply the defect which *Jorávermal Sivlál v. Dáðíbhái Berámji* and other similar cases disclosed in Act XXI. of 1848 (which excluded suits on wagering transactions), and to close the doors of the courts of justice in this Presidency to suits upon contracts collateral to wagering transactions where such collateral contracts have been entered into or have arisen since the Act came into force, a purpose which it has effectually answered, but the Act was never intended to be applicable to prior contracts. Supposing then the plaintiffs to have been only the agents of the defendant, and, as such, to have entered in their own names into the wagering transactions on his behalf, the authorities already quoted show clearly that, notwithstanding that the commission and brokerage were earned in respect of services relating to wagering transactions, this action would lie for that commission and brokerage, and further that, unless the defendant, before the plaintiffs paid losses on those wagering transactions for him, had countermanded their authority as agents, and forbidden them to make such payments, they would be entitled to recover the amount of those payments. Assuming, however, that the plaintiffs were, as the defendant alleges, his partners in the wagering transactions, they would still, nevertheless, be entitled to recover from him his share, at least, of all losses which they have paid for him, unless it can be shown that, before they made such payment, he forbade them to do so. Lord Wensleydale says (6 Ho. of Lords 417); "The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete

partnership is liable for himself, and, as agent for the rest, binds them upon all contracts made in the course of the ordinary scope of the partnership business." Mr. Lindley (Vol. 1, 743), in discussing the subject of contribution and indemnity between partners, says :—" It is to be observed that every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal to the debts and engagements of the firm, and he is entitled to contribution from his co-partners ; for they have no right to throw on him alone the burden of obligations which, *ex hypothesi*, are theirs as much as his. Again, each member, as an agent of the firm, is entitled to be indemnified by the firm against losses and expenses, *bond fide* incurred by him, for the benefit of the firm, whilst pursuing the authority conferred upon him by the agreement entered into between himself and his co-partners."

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There was an unreported case (*Aban Shá Sáheb Ali v. Kássiráv Bábá Sáheb Holkar and others*) before Sir Mathew Sausse, C.J., in which the plaintiff filled the character as well of partner as of agent (in the strict sense of that term) with the defendants. The suit was one which had been instituted at the Equity Side of the late Supreme Court, but was decided in the High Court. It may be useful to quote *in extenso* the following note of Sir M. Sausse's judgment :—

" This is a demurrer for want of equity to the plaintiff's bill, which prays for an account of partnership transactions, between the plaintiff and the defendants, in respect of opium time-bargains or contracts which they had mutually agreed to enter into with third parties through the agency of the plaintiff, who also claims, under the partnership agreements, a brokerage or commission upon each of those transactions, as well as interest upon advances made by him for partnership purposes.

" The plaintiff and defendants, having agreed to speculate in opium time-bargains, on the 7th February 1861, entered into the following agreement in writing :—

" ' To Aban Shá Sáheb Ali (the plaintiff), written by the undersigned. As to bargains for chests of opium by the

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fixed time of 25th February 1861, chests will be sold and will be purchased, and earnest money will be paid and received. Vithaldás Mangalji will cause these bargains to be entered at your place. Do you be pleased to enter the same. For the bargains you may enter, do you be pleased to send notes containing the particulars. 7th February 1861.'

"The plaintiff and the several defendants subscribed for the number of shares attached to their names respectively, and in the following form, which is that adopted by the first defendant:—'In this I have eight annas whether profit or loss be obtained at the rate of eight annas.'

"The plaintiff had one-sixteenth share only. It was orally agreed that he should receive a brokerage or commission of two rupees per chest upon all bargains, and also interest at 9 per cent. upon all advances made by him in payment of differences under the partnership agreement.

"The plaintiff, with the knowledge and consent of the other partners, received from, and paid to, third parties several sums on account of differences. The payments having largely exceeded the receipts, a loss accrued to the partnership, and, when the plaintiff called upon the partners to pay their proportion of the losses which had been paid by him in conformity with the partnership agreement, the defendants refused to contribute. The plaintiff then filed this bill, and the defendants demurred for want of equity. The defences relied upon are: 1stly, that such 'time-bargains' were rendered illegal by the Indian Wagering Act XXI. of 1848; 2ndly, that, by Hindu law, such wagers or time-bargains are illegal.

"In conformity with decisions upon the analogous English Wagering Statute 8 and 9 Vic., C. 106 (from which the Indian Act is almost literally copied), this Court has repeatedly decided that wagers are not rendered illegal by Act XXI. of 1848, and it has so held very recently (l) in an

(l) On the 10th August 1861. Mr. Anstey then strongly insisted on the illegality, by Hindu Law, of wagering transactions, and cited 2 Borr. 415, 621, Ed. 1st; Bellasis R. 72; Morris, Part III, Sel. Ca. S. D. A., p. 33; and Manu Ch. VIII., pl. 7, and Ch. IX., pl. 221 to 227; but without success. An attempt then made by him to bring the case within the English laws against forestalling, regrating and engrossing, likewise failed.

action brought by the present defendant, Kássiráv Bábú Sáheb Holkar, against Rámlál Thákursidás on the Plea Side of the late Supreme Court, when a defence similar to the present was relied upon by Rámlál.

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" Legislation, both in England and India, with respect to wagers, is very similar in character to that which took place nearly two centuries ago with respect to other contracts, when the Statute of Frauds (29 Car. II., C. 3), in the 4th and 17th sections, declared that no actions should be brought on certain contracts, and that a certain other class of contracts should not be allowed to be good.

" Those contracts were never held to be illegal. In the hurry and excitement of commercial activity, they are daily entered into in England, but, although not legally binding upon the contracting parties, they yet form the legitimate subject of partnership dealings and accounts which are there investigated and enforced by courts of law.

" With a view to the protection of legitimate commerce and honest trading from the evil consequences of this widely spread practice of gambling in India, it might, on the whole, have been better to have declared such wagers to be illegal, and not simply null and void, but that is for the Legislature, the province of courts of justice is to administer law as they find it, and not to make it.

" The first ground of defence then fails altogether. It has been strongly urged at the Bar that the Privy Council has not yet pronounced any judgment upon the point that wagers are illegal contracts by Hindu law, and that it was, therefore, open to the defendants to rely upon that defence.

" Although there was no express decision upon that point in the judgment delivered in 1850 by Baron Parke in *Dulabdas v. Ramlal (m)*, yet there was a very strong expression of opinion by the Privy Council that the authorities referred to in the arguments did not support the proposition that wagers or time-bargains were illegal by Hindu law; and in the case of *Raghunath Chotalal v. Manakchand (n)*, which

(m) Perry O. C. 232.

(n) 6 Moore I. A. 251.

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was decided in 1856, this point of illegality was not raised, or adverted to, although it would, if supported, have led to a contrary decision.

"All the authorities relied upon in the present argument were brought before the late Supreme Court in 1849 in the case of *Ramlal v. Dulabdas*, (o) but there was an unanimous judgment of the Court that wagers were not illegal by Hindu law. It is so far *res judicata*, but, after having examined all the authorities referred to in argument and in the judgment of the Court in that case, together with any other which I have been able to discover, I fully concur in the soundness of that decision, and with the observations of Chief Justice Perry, which are to be found at pp. 227-28.

"In Halhed's *Gentu Law* (published in 1775) the text of *Yājñyavalkya* is given, by which even a common gaming wager is directed to be enforced by law, if made publicly in a recognised gambling-house 'and the king's share paid,' and in the *Mayukha*, Chap. XXI., pl. 2, the author treats Section 224 of Chap. IX. of *Manu* (which has been relied upon in argument for the defendants in support of the demurrer) as declaring the punishment of gambling 'without the permission of the king.'

"After such a clear recognition of public gambling-houses, and of gambling debts being recoverable by the aid of the State, it would, in my opinion, be impossible to contend successfully that all wagers are contrary to the spirit of Hindu law, or to immemorial and generally accepted Hindu usage. Indeed, so far as usage is known, it is in favour of the recognition of wagers as a head of legal contract. I entertain no doubt that wagers are not illegal contracts by Hindu law beyond the specific instances in which some descriptions of them were prohibited by a recognised law giver, such as *Manu*, or by the ordinances of a sovereign.

"The state of Hindu law on this subject appears to have been very analogous to that of British law before the Stat. 8 and 9 Vic., C. 106, until which period wagers generally

(o) Perry O. C. 224.

were lawful contracts, although particular descriptions of them, such as gaming with dice, cards, &c., were rendered illegal by Statute.

“As it was stated in argument that a similar defence was raised in a case now depending before the Judges sitting at the Appellate Side of the Court, and that a question upon the legality of wagers or time-bargains (*Váyadá Vyāpár*) has been sent by those Judges to the Hindu law officer for his decision, I have procured both and find his reply to have been that there is no specific provision in the Shástra in respect of such a transaction.

“I refer to it, not as authority upon the subject, but to show that, as far as can be ascertained from Hindu works, either translated or in the vernacular, there is no prohibition to be found against wagers or time-bargains, as a general head of contract.

“The subject-matter of partnership dealings in the present case was not of an illegal character, and, upon the facts stated in the bill, the defendants must abide by their contract with the plaintiff, and contribute their share of the losses incurred as well as pay the stipulated brokerage on the various transactions entered into by him upon their behalf.” Sir M. Sausse then overruled the demurrer with costs.

The Subordinate Judge having overlooked the bearing of the law of partnership upon the admission of the defendant that he had entered into time-bargains in partnership with the plaintiffs, we must (except as presently mentioned) reverse his decree. As there must be a new trial, we do not purpose now to express any opinion whatever upon the questions of fact, viz., 1st, whether the plaintiffs were simply agents, or 2nd, whether they were agents and partners, or 3rd, whether they were partners only of the defendant in the transactions out of which this suit has arisen, or in any one or more of those transactions. All of those questions we leave open for determination by the Subordinate Judge upon the new trial, as well as the amount of the balance or balances (if any)

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due from the defendant to the plaintiffs in any one or more of the three capacities above mentioned. In the investigation of those questions, it will be important that the Subordinate Judge should carefully consider the question as to the genuineness of Exhibits Nos. 26 and 27, or of either of them. In doing so, he may resort to comparison of the handwriting in those documents with that in Exhibits 29 and 31, which are admitted by the defendant to have been written by him. The Subordinate Judge may, if he thinks fit, take the evidence of independent experts as to the handwriting in Exhibits 26 and 27 as compared with the admitted exhibits. The court below may very possibly have been right in deeming the dealings between the plaintiffs and defendant to be *Sattá* transactions or collateral to such transactions, but what has been already said as to the law of this case shows that to be an immaterial question. The Subordinate Judge having held that the defendant failed to prove his cross demand of Rs. 5,019-9-0, or any part thereof, and the defendant not having appealed against that finding, we consider it conclusive upon him. He, therefore, cannot be permitted on the new trial to re-open that question. If his contention be true that the dealings sued upon by the plaintiffs were dealings in partnership between them and himself in his individual capacity, and not with his firm of Shá Nathubháí Ransordás, which he avers to consist of several partners, he could not properly have set up as a counter-claim in this suit the balance of Rs. 5,019-9-0, which he alleges to be due to that firm. Any attempt to establish that claim should be in a suit to which all of the members of that firm were parties.

Except as regards the counter-claim of Rs. 5,019-9-0 set up by the defendant, the Court reverses the decree of the Subordinate Judge of the 28th of January 1871, and remands the cause for a new trial on the merits, at which regard should be had to the observations contained in this judgment, a copy of which accompanies the decree. Costs of this appeal and of the cause are to abide the result of the new trial. The English memorandum of appeal must be amended by rendering its heading conformable to that of the plaint and suit.

[APPELLATE CIVIL JURISDICTION.]

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March 11.*Cross Special Appeals Nos. 542 of 1873 and 90 of 1874.*

No. 542.

KRISHNA'JI VYANKTESH.....*Defendant and Appellant.*PA'NDURANG, deceased, by }
his son VYANKA'JI..... } *Plaintiff and Respondent.*

No. 90.

PA'NDURANG, deceased, by }
his son VYANKA'JI..... } *Plaintiff and Appellant.*KRISHNA'JI VYANKTESH*Defendant and Respondent.**The comparative weight of authority of Mitāksharā and Mayukha in the
Southern Maratha Country.*

In Western India, on questions of inheritance, the first place is assigned to the Mitāksharā, and only a subordinate, though still an important one, to the Mayukha, on the authority of the responses delivered officially by the Shāstris of the courts and oral statements of persons learned in the Hindu law of this Presidency.

Bābaji Kāshināth v. Anandrāv Bhāskar commented upon.

THESE were cross special appeals from the decision of S. Tagore, Assistant Judge at Belgaum, amending the decree of the Subordinate Judge of Bālgalkot.

Pāndurang brought this suit for the possession of certain lands and other property, on the allegation that the same belonged to his half-brother, Vasāpā, who died childless, leaving him surviving his widow, Lakshmibāi, that Lakshmibāi died on the 20th December 1864, and that the plaintiff was entitled to the possession of the property claimed as the next heir of Lakshmibāi's husband. Krishnāji asserted his own preferential right to the property as a nephew (brother's son) of the deceased Vasāpā, and also claimed part of the property under some other rights. The Subordinate Judge, on the authority of the Vyavahār Mayukha, held that the defendant Krishnāji, the nephew of the deceased Vasāpā, had a better right to succeed as his (Vasāpā's) heir than the plaintiff, who was Vasāpā's half-brother. The first court accordingly dismissed the plain-

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In special appeal, the principal contention was, which of the two authorities, the Mitákshará or the Mayukha, prevailed in the Southern Maratha Country and governed the present case.

The special appeal was argued before WEST and PINHEY, JJ., on the 11th March 1875.

Ghanashám Nilkanth, for the appellant, contended for the superior authority of the Mayukha, and cited Steel, p. 7, 2nd Ed. ; Borradaile's Pref. to the Mayukha (Stokes H. L. B.; p. 6,) and the judgments of Arnould, J., in *Ramiá v. Bhági* (a), of Sausse, C.J., and Arnould, J., in *Vináyak v. Lakshmibái* (b), and of Melvill and Kemball, JJ., in *Natháji v. Hari* (c). In *Viziarangám v. Lakshman* (d), Westropp, C.J., relied upon the Mayukha and not upon the Mitákshará. So too Sargent, J., expressly gave preference to the Mayukha over the Mitákshará in *Bábáji Káshináth v. Anandráv Bháskar*, decided on the Original Side of this Court. If the Mayukha governs this case, the appellant Krishnáji is entitled to succeed in preference to Pándurang, on the authority of Mayukha, Chap. IV., Section 8, pl. 16 ; *Dináji v. Rámji* (e).

Vishnu Ganashám, contra :—The Mitákshará is the greatest of all the Hindu law authorities, especially in Western India; 1 Mor. Dig. Introd., p. 204; West and Bühler, Introd.;

(d) 1 Bom. H. C. Rep. 66, see p. 68. (b) *Id. Ib.* 117, see p. 122.

(c) 8 Bom. H. C. Rep. 67 A.C.J., see p. 72.

(d) *Id. Ib.* 244 O.C.J., see p. 273. (e) Bellasis Sel. C'a. 11.

pp. 1, 2; Colebrooke's Preface to the Mit. (Stokes, H. L. B., p. 173). Steel and Borradaile, so far from supporting the other side, attribute superior authority to the Mitákshará over the Mayukha: Steel, p. 4, 2nd Ed.; Borradaile's Preface to the Mayukha, (Stokes H. L. B., p. 5). The authority cited from West and Bühler's Introduction must be considered of peculiar value, because it is based on the opinions of Shástris, as expressly stated there. The opinion of Westropp, C.J., on the question of the comparative weight of authority of the Mitákshará and Mayukha, in the Bombay Presidency, is expressed in *Naráyan Bábaji v. Náná Manohar* (f). *Bábaji Káshináth v. Anandráv Bháskar* does not apply to the present case, as the parties are not residents of the island of Bombay.

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The judgment of the Court was delivered by

WEST, J.:—The present case turns on the comparative authority on questions of inheritance in the Southern Maratha Country of the Mitákshará and Vyavahára Mayukha. Their relative weight has been estimated in 1 W. and B. Introduction I., II., so far as an opinion could be gathered from the numerous responses with which the editors of that work had to deal, as delivered officially by the Shástris of the Courts, and from the oral statements of persons learned in the Hindu law of this Presidency. As to the former the Privy Council have said, in the case of the *Collector of Madurai v. Mootoo Rantalinga Sathupathy* (g) that “these opinions * * * could not be shaken without weakening the foundation of much that is received as the Hindu law in various parts of British India.” The first place is, on such authority, assigned to the Mitákshará, only a subordinate, though still an important one, to the Mayukha. The view there expressed is in accordance with that taken by the Privy Council in the same case, at p. 435, of the “supreme authority” of the Mitákshará, and it has since been repeated by the learned Chief Justice of this Court.

(f) 7 Bom. H. C. Rep. 153 A.C.J., see p. 167.

(g) 12 Moore I. A. 397, see pp. 433 and 439.

1875. At ¹/₇ Bom. H. C. Rep. 167 A.C.J., he speaks of the Mitákshará as "foremost amongst legal authorities in Mahárástra," while of the Vyavahár Mayukha he says, in the same case, at p. 169, that it "ranks next in authority in the west of India and in the Maráthi school to the Mitákshará." In cases of direct conflict between the two authorities, there can be no doubt, after these expressions of opinions, that preference should, in general, be given to the Mitákshará doctrine, although where the Mayukha's gloss may not seem easily reconcilable with the text, its construction is to be received, if not absolutely contradictory to the "supreme authority."

It is true that that doctrine has, in some instances, been broken in upon in Guzerat, by an adoption of the different views propounded in the Mayukha, and in the island of Bombay, where a large and intelligent part of the population has been furnished by Guzerat, the Mayukha may perhaps rank as the foremost authority. This is the utmost that can be deduced from the language attributed to the Chief Justice in the report of *Viziárángám's case*. It was not his intention certainly to lay down a general rule as to the comparative weight of the two authorities at variance with what he had said but a short time before. The doctrine of the Mayukha was, in a subsequent case (*Bábháji Káshináth v. Anandráo Bháskar*), preferred by Sir Charles Sargent to that of the Mitákshará in a case of inheritance between parties resident in the island of Bombay; but this has no conclusive bearing on a case arising in the Southern Maráthi Country. The conflict of opinion which the learned Judge supposed to have existed between the Judges in *Viziárángám's case* did not in fact arise; they were in perfect accord as to the decision and the grounds of it. The case is not one which could have much bearing on the one we have now to deal with; but so far as it does bear on it, it is in favour of the general paramount authority of the Mitákshará, subject to a local exception for the island of Bombay.

Accepting the Mitákshará, however, as furnishing the law

by which this case is to be decided, the half-brother's right of succession takes precedence of that of the son of the brother of the whole blood : Stokes H. L. B. 445, 1 W. and B. 129. Several decisions to the same effect have been passed by the High Court of Bengal, and are referred to in Cowell's Digest.

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The cross appeal of Vyankáji has not been seriously pressed. We must confirm the decree of the District Court, with costs of each appeal on the party appellant therein.

Decree confirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 169 of 1874.

March 16.

LAKSHMAN RA'MCHANDRA } *Defendants and Appellants.*
and others

SARASVATIBA'I..... *Plaintiff and Respondent.*

Maintenance—Ancestral property—Hindu law—Purchaser bonâ fide and for value.

The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a *bonâ fide* purchaser from her late husband's successors any more than the payment of unsecured debts due by the family.

The proposition in *Ramchurun Tewaree v. Mussamat Jusooda Koonver* (2 Agra 134) that the liability of family property, in the hands of a purchaser, for the maintenance of a widow, depends on the ability of her husband's heir to support her, dissented from.

THIS was a special appeal from the decision of W. H. Crowe, Acting Assistant Judge at Tanna, in Appeal No. 378 of 1872, confirming the decree of the Subordinate Judge of Alibâg.

The appeal was heard by KEMBALL and NA'NA'RA'I HARIDA'S, JJ.

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Dhīrajāl Mathurādās (Government Pleader) for the ap-
pellants.

Bhairavnāth Mangesh for the respondent.

The facts of the case and the arguments on both sides
fully appear from the judgment of the Court delivered by

NA'NA'BHA'I HARIDA'S, J. :—The respondent, Sarasvatibái, a
Hindu widow, sued her nephew, Mahádev Náráyan (not be-
fore the Court now), and the two appellants to recover from
them Rs. 48 as her maintenance for 1869-70, and to have
the same declared a charge, during her lifetime, upon cer-
tain ancestral property in the hands of the appellants.

The appellants are *bond fide* purchasers of that property
for valuable consideration, and the only ground on which it
is sought to charge them with the maintenance is that they
are now in possession of property, which, if it had remained
undisposed of in the hands of her nephew, would have been
liable for such maintenance.

The plaintiff's husband, according to her own statement,
appears to have died about forty years ago, during the lifetime
of his father. When the plaintiff's father-in-law died does
not appear, nor is there anything to show when her brother-
in-law, Náráyan, died. But it seems that the property of
the family, after their death, came into the possession of their
sole heir, Mahádev Náráyan, her nephew. It further seems
that Mahádev sold a portion of it about seven years ago to
the first appellant, who again sold a portion thereof to the
second appellant.

What the occasion for the sale to the first appellant was
has not been ascertained by the court below, though it ap-
pears from the Subordinate Judge's judgment, that the sale
was made to pay off "debts," which Mahádev Náráyan alleg-
ed to have been "contracted for family purposes." Whether
such was really the case or not, there is no ground what-
ever for supposing that it was other than a *bond fide* sale for
valuable consideration.

Mahádev Náráyan, among other defences, which it is not necessary now to refer to, contended that as in a former suit the plaintiff was declared entitled only to Rs. 12, she could not in this suit claim more.

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The other defendants, the appellants before us, contended that they were not liable at all, as they were *boná fide* purchasers for valuable consideration.

The Subordinate Judge of Alibág, and the Assistant Judge in appeal, awarded the plaintiff's claim with costs, declaring her entitled, during her lifetime, to receive annually Rs. 12 from her nephew, and Rs. 36 from the proceeds of the property in the possession of the appellants, *i.e.*, Rs. 18 from each of them.

The question which we have, therefore, to decide in this special appeal is whether, under the above circumstances, the property in the possession of the appellants is at all liable to be charged with the plaintiff's maintenance. This must evidently depend upon what rights Mahádev Náráyan and the plaintiff Sarasvatibái respectively had in the property before the sale of it by the former to the first appellant. If the vendor was absolute owner, it is clear the sale conveyed absolute ownership of the property to the vendee, the first appellant. But if that was not the case, it is equally clear that by the sale such right only passed to the vendee as was possessed by the vendor.

Upon the findings recorded by the lower courts, we must take it that the property in question was the ancestral property of Sarasvatibái's father-in-law; and such being the case, we must also take it that her husband had, from the time of his birth, a right in that property equal to his father's, which continued to his death, some forty years ago. In virtue of this right, he might have obtained a partition of that property from his father and other co-parceners, in which case, upon his death, Sarasvatibái would have succeeded to his share of it. But he died undivided, and, according

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to the Hindu law applicable to such cases on this side of India, the property vested in those co-parceners, of whom Mahádev Náráyan is now the sole survivor. While in his possession as such, he sold it to the first appellant. Unless, therefore, at the time of the sale, she had an interest in the property in the nature of a charge upon it, it would be difficult to hold that it did not pass absolutely to him.

It is contended for the respondent that she had such interest ; that her maintenance was a " charge " on the ancestral property ; and that, therefore, those who have purchased it, have done so subject to such " charge." In support of this contention, Mr. Bhairavnáth has cited to us several authorities, which we shall now examine to see if they establish the proposition contended for.

In *Shidápá v. Parsyá* (S. A. 433 of 1871), decided on the 18th December 1872, by Sir Charles Sargent and Mr. Justice Melvill, their Lordships had not to decide the question raised here, and they did not decide it. From the judgment recorded in the case, it would appear to have been a suit by a Hindu widow to eject a purchaser of some family property, and her claim was disallowed, their Lordships observing: " The plaintiff can, if so advised, bring another action for maintenance, but in the present suit, as she has failed to establish her claim to the property, we must reverse the decree of the court below, and disallow the claim." In that case, if they have expressed any opinion at all on the subject, it is one which rather doubts the soundness of the proposition now contended for since they remark: " In the present case, the defendant is a stranger, and the property, in respect of which the action is brought, would be liable (*if liable at all*) only under certain circumstances, the existence or non-existence of which cannot be ascertained without raising issues foreign to the contention between the parties, &c. "

In the case of *Mussumat Golub Koonver and others v. The Collector of Benares and another* (a) there was no question,

as in this case, between a widow and a *bonâ fide* purchaser for value of ancestral property, and it cannot, therefore, be said to have decided the point now raised. It was a case of confiscation by Government under Bengal Regulation XI of 1796 of the whole property of a joint Hindu family, consisting of the widow and four sons of the last owner, for an offence of which three only of those sons were guilty, the fourth being a minor, and their Lordships of the Privy Council held that the confiscation did not affect the right of the fourth son, or of the widow to her maintenance out of the whole of the ancestral estate. They virtually declared liable to confiscation by Government such portion only of the whole estate as, upon a partition, would have fallen to the share of those three sons; and the widow's right to maintenance would appear to have been tacitly conceded by Government, for the judgment says (p. 258): "Nothing was urged at the bar against this right."

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In *Mussumat Khukron Misra v. Jhoomuck Lall Dass* (b), the question now raised did not properly arise between the parties, and though there is in the judgment a *dictum* to the effect that the widow "could make the estate chargeable with it into whose hands soever it had fallen under the foreclosure," no authorities are cited in support of the position, and it rather assumes that her claim for maintenance is in the nature of a "lien" on the estate. Besides, this dictum has reference to the contention in argument that as the widow's claim for maintenance was a charge on the estate, therefore she had an interest in keeping the estate in the family; and, moreover, the estate was only declared to be chargeable, if the widow failed in getting her maintenance from the members of her late husband's family.

The case of *Rámchandra Dikshit v. Sávitribái* (c), principally relied upon by the Subordinate Judge, and strongly pressed upon our attention by Mr. Bhairavnáth, though it

(b) 15 Calc. W. Rep. 263 Civ. Rul.

(c) 4 Bom. H. C. Rep. 73 A.C.J.

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might at first sight seem to do so, when it lays down that "By Hindu law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof," does not in reality determine the question now before us. Whether her maintenance is such "a charge" or not was not the point the Court was called upon to decide in that case, and we have the authority of the learned Judge himself, whose judgment contains those words, for saying that it did not decide that point; for, when in a later case (*d*), the case of *Rámchandra Dikshit v. Sávitribái*, was cited before him in argument as deciding that "the maintenance of a Hindu widow is a charge," &c., he observed: "The question there was as to whether one brother could be sued alone, and it was held, that he could" (*e*).

The case of *Shrimati Bhagabati Dasi v. Kanailal Mitter* (*f*) cited by Mr. Bhairavnáth in support of his proposition, is in reality more against than for his client. It decides (1st) that "as against one who takes as heir, a Hindu widow has a right to maintenance out of the property in his hands," which, no doubt, is as good law in this Presidency as it is in Bengal, but which does not apply to the present case; (2ndly) that she also has a right to maintenance out of such property in the hands of anyone who takes it with notice of her having set up a claim for maintenance against the heir"—as to the application of which to this case it is sufficient to say that it has never been contended that any such claim had been set up by the plaintiff, or that the appellants had any notice of it when they purchased the property sought to be charged; and (3rdly) that "by the law of Bengal she has no lien on the property for her maintenance against all the world irrespective of such notice."

The case of *Prosonno Coomarsein Mozoomdar v. The Revd. B. F. X. Barbosa* (*g*) does not seem to us to apply to

(*d*) *S. M. Niotarini Dasi v. Mahantal Dutt*, 9 Beng. L.R. 11.

(*e*) *Id. Ib.*, p. 27.

(*f*) 8 Beng. L. R. 225.

(*g*) 6 Calc. W. Rep. Civ. R. 253.

the present case. There "a charge" in the strict sense of the term having been created by will upon an entire estate in favour of the respondent, and a portion of such estate having come into the appellant's possession as purchaser, it was held that the person in whose favour the charge was created was at liberty to proceed against the party in possession of any part of the estate subject to the charge, leaving such party to recoup himself by contribution from his co-sharers. To apply this decision to the present case, one must assume the very point that is sought to be established, namely, that a Hindu widow's claim to maintenance is "a charge" upon the estate.

The learned authors of the Digest of Hindu Law certainly seem inclined to think that it is such a charge, and that any family property in the hands of a purchaser should, therefore, be regarded as subject to it (h); but they do not support their opinion by any reasoning or texts or decided cases, to enable one to determine whether it is well founded.

We last come to the cases of *Heera Lall v. Mussumat Kousillah* (i) and *Ram Churun Tawaree v. Mussumat Jasooda Koonwer* (j) also relied upon for the respondent.

In the first of these cases the facts are not fully set out in the report; but sufficient appears in it to enable one to guess with tolerable certainty what they were. It would seem that the amount of the widow's maintenance had been fixed at "four rupees per month," which must have been done either by a family arrangement or by a decree of the Court; that express mention was made of it in the sale deed, which also stipulated that that sum should be paid by the vendor—circumstances pointing to the inference that the parties were dealing with each other upon the basis of that maintenance being actually charged on the property, and that the vendee was anxious to free it from the charge; that the widow was no

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(h) West and Bühler, Book II., Introduction, p. xxxvii., para. 2; *Ibid.* p. 32.

(i) 2 Agra 42.

(j) *Id. Ib.* 134.

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party to the deed ; and that from the moment she came to know of it, she " vigorously opposed the mutation of names." If such were the facts, the general question " whether the widow has an actual lien on the property of her deceased husband, or only a right of action against the heir personally, who takes the property," was by no means necessary to the determination of the case, and the court's answer to it, that " the widow's right is a charge on the property which formed the estate of her husband," stands upon no higher footing than a *dictum*. But if we have not rightly conjectured the facts, the case is certainly a direct authority in support of Mr. Bhairavnáth's contention, though it is not very clear why the court, holding as it did, and dismissing the purchaser's appeal, should have ordered that " the decree should be executed first against the heir Madho Singh" (who was not a party to the appeal) " and if he fails to pay it, then against the other defendant," the purchaser. If the widow's right was " a charge," why was she not to be at liberty to realize it out of such property in the first instance, she preferring so to do ?

In the other case of *Ram Churun Tewaree v. Mussumat Jasooda Koonwer (k)*, the doctrine of the widow's maintenance being " a charge " on the estate was sought, but in vain, to be carried to its logical consequence. The respondent, under Section 348 of the Civil Procedure Code, objected that " she should be permitted to enforce her claim against the property purchased by the appellant in the first instance, and not, as the Principal Sadar Amin had decided, after unsuccessfully endeavouring to enforce it " against her husband's heirs and their property. The objection, however, was disallowed, although it had been held that the appellant had purchased the property in execution of a decree in his own favour, which the heirs, in collusion with him, had allowed to pass against themselves. This case lays down that property in the hands even of a collusive purchaser is not liable, except under certain circumstances ; and that the widow should proceed in the first instance against the heirs and their property. According to this decision, whether a widow's maintenance in

(k) *Vide Sup.*

a given case is or is not a charge upon family property in the hands of a purchaser, must depend upon whether her husband's heirs are or are not able to support her—a proposition which appears to us to be unsupported by reason or authority. If her maintenance is really “a charge” upon the alienated property, it is not easy to perceive how it can cease to be so by the fact of the heirs having property which may be their own acquisition, nor, if at the time of the alienation the property does not pass to the alienee burdened with any such charge, how one can well be imposed upon it subsequently, merely because the heirs happen at the time to have no property, which may be the result of their own improvidence.

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These authorities, then, do not seem to us to establish that the maintenance of a Hindu widow is a charge on any such property in the hands of a *bonâ fide* purchaser from her late husband's successors, and one of them at all events is certainly an authority the other way (l).

The texts, which relate to maintenance, occurring in the principal works of authority on this side of India, lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain (m). But it will be seen that similar texts also enjoin upon him “the payment of debts” (n), “the initiation of the uninitiated as well as “the marriage of the unmarried members of the family” (o), and the performance of certain ceremonies for the spiritual benefit of that person (p), and all these are, in English works on Hindu law, spoken of as “charges on the inheritance” (q) no less than the maintenance of the dependent members of his family. If the latter, therefore, is “a charge” on the inheritance, it is so in no other sense than that in which the former are so.

(l) 8 Beng. L. R. 225.

(m) Vyav. May. Ch. IV., Sec. IV., 30; *Ibid.* Sec. IX., 22; *Ibid.* Sec. XI., 1, 3, 9, 12; Mit., Ch. II., Sec. I., 7, 12, 13, 20, 21; *Ibid.* Sec. X., 5, 15.

(n) Mit. Ch. II., Sec. XI., 24; Vyav. May. Ch. V., Sec. IV., 12, 14, 16, 17, 19.

(o) Vyav. May., Ch. IV., Sec. IV., 38-40; Mit., Ch. I., Sec. VII., 3-6.

(p) 2 Coleb. Dig. 576, 577 (Mad. Edn.); Vyav. May., Ch. IV., Sec. VIII., 29.

(q) 1 Str. H. L. 166, 170.

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Now it has been held both in Bengal and here that a creditor cannot follow the assets of a deceased Hindu into the hands of a *bonâ fide* purchaser for valuable consideration. See *Sunbassapa v. Moodkapa* (r), *Naroo Hyree v. Konheir-Munohur* (s), *Jamiyatrâm Râmchandra v. Parbhudâs Hathi* (t), and *Unnopoorina Dassia v. Gunga Narain Paul* (u).

It is indeed laid down in a work of great authority that "debts follow the assets into whosoever hands they come" (v), but, as observed by Westropp, C.J., in *Jamiyatrâm Râmchandra v. Parbhudâs Hathi* (w), the proposition is "too broadly stated," and is not warranted by the authorities upon which it is based.

If, then, property in the hands of a *bonâ fide* purchaser cannot be pursued by a creditor of the deceased proprietor, it is difficult to see how the case of a widow, whom he was legally bound to maintain, no less than he was to pay his debts, is to be distinguished. What is there to render such property liable in the one case and not in the other?

Moreover, it is difficult to understand when this "charge on the inheritance" is said to attach to the family property. The duty of maintaining a female legally rests with her husband from the moment of her marriage. No distinction is drawn in the Shâstras between wives and widows; if, then, her right to maintenance becomes a charge from the moment of marriage, every alienation made subsequently is subject to such burden—a liability capable of being enforced at any time when the wife or the widow is unable to obtain maintenance from her relatives.

We must, therefore, revoke the decrees of the lower courts so far as they affect the special appellants, or the property in their hands as purchasers. The sum of Rs. 12, which the plaintiff will receive under those decrees from her nephew Mahâdev Nârâyan may not be sufficient for her maintenance; but, inasmuch as she has chosen not to appeal against them, and inasmuch as he, Mahâdev Nârâyan, is not before us, we are unable

(r) 8 Harr. 232.

(u) 2 Calo. W. Rep. Civ. R. 296.

(s) *Id.* B. 289(t) 1 Str. A. L. 166; 2 *Id.* 282.

(t) 9 Bom. H. C. Rep. 116.

(w) 9 Bom. H. C. Rep. 117.

to inquire into, or order any inquiry into, the sufficiency or suitability of that allowance; and as the special appellants were improperly made parties to this suit, we think they are entitled to their costs throughout.

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Decree accordingly.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 42 of 1872.

March 18.

BA'I AMRIT, widow of JIVA' } (*Original Plaintiff*)
MAHESHVAR } *Appellant.*

BA'I MA'NIK, widow of MAHESH- } (*Original Defendants*)
VAR, and four others } *Respondents.*

Hindu Law—Widow—Manager—Son's widow—Grandson's widow.

Alienations for family purposes of the ancestral estate by a Hindu widow (the mother of a minor son), though she was not appointed an administratrix under Act XX. of 1864, upheld as made by a *de facto* manager.

A Hindu died leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently his grandson died a minor, leaving his widow (also a minor) him surviving :

Held that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property.

THIS was an appeal from the decision of Bholánáth Sárábhái, 1st Class Subordinate Judge of Kaira, in the District of Ahmedabad, awarding to the plaintiff half a share in a part of the property claimed by her.

The appeal was heard by WEST and NANA BHAI HARIDAS JJ.

Nagindás Tulsidás for the appellant.

Shántarám Náráyán for the first respondent, Báí Mánik.

Dhirajlál Mathurádás, Government Pleader, for the second and third respondents.

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The fourth and fifth respondents did not appear in person, or by pleader.

The facts, in so far as they are material, and arguments appear from the following judgment of this Court delivered by

NA'NA'BHA'I HARIDA'S, J. :—Bái Amrit instituted this suit to establish her right to certain property, moveable and immoveable, and recover possession of the same from the defendants.

The facts of the case, which are not disputed, are as follows :—One Ghelábhái Aditrám, the head of a joint Hindu family, died in Samvat 1918 (A.D. 1861-62), leaving some ancestral property, the subject of this suit. The defendant, Bái Mánik, is his daughter-in-law, the widow of his son Maheshvar, who had predeceased him in Samvat 1913 (A.D. 1856-57), and the plaintiff Bái Amrit is the widow of Maheshwar's son, Jivá, who died a minor in Samvat 1921 (A.D. 1864-65).

The other defendants are Bái Mánik's vendees, and as such are in possession of a portion of the immoveable family property mentioned above.

The defendant, Bái Mánik, among other things, contended that she had sold two of the fields mentioned in the plaint, Nos. 321 and 292, to pay off family debts; that as to the rest of the immoveable property, a house and two other fields, Nos. 456 and 362, she was living in the former and maintaining herself from the produce of the latter, which amounted only to Rs. 30 a year; that she had always been in possession of the same from the time of her husband and father-in-law, and was entitled to continue in possession; that the plaintiff, being a childless widow, was entitled only to food and clothing, which she was willing to allow her according to her means; that neither by Hindu law nor by the usage of the country or of the caste was the plaintiff entitled to succeed to the family property; and that as her husband, Jivá, being himself deaf from birth and an idiot, had not succeeded to that property, she could not claim it as his heir.

The other defendants contended that they were *bonâ fide* purchasers for valuable consideration, the first two from Bái Mánik herself, and the other two from one Bháiji Raghunáth, another purchaser from her.

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It has been clearly found by the Subordinate Judge that the sales by Bái Mánik to her first two co-defendants and to the vendor of the other two co-defendants were for family purposes, namely, for paying off debts incurred for the performance of the funeral ceremonies of her father-in-law and grandmother-in-law, and also of the marriage and funeral ceremonies of her son, Jivá, the plaintiff's husband, and the appellant has failed to satisfy us that the Subordinate Judge was wrong in the view he took of the evidence on that point. Bái Mánik at the time of the sales above mentioned, was the only adult member of the family, and in management of the family property as such. She was, moreover, by Hindu law, the guardian of her late minor son and of her minor daughter-in-law, Bái Amrit, and competent in that capacity to deal with the family property for the benefit of the estate: *Bái Kesar v. Bái Gangá (a)*. It is true that she does not appear to have been appointed manager by the civil court under Act XX. of 1864. But seeing that she was manager *de facto* of the family, her sales in that character of portions of the family property for valuable consideration, which, when obtained by her, was actually applied to meeting family necessities, cannot, we think, be questioned. The Hindu law enables even a slave, *a fortiori*, therefore, a person in Bái Mánik's position, to bind the family by contracts made under the circumstances found in this case (b). We must, therefore, disallow that portion of the plaintiff's claim which relates to the property in possession of the co-defendants as purchasers.

As to the rest of the property, which Bái Mánik admits to be in her possession, the question arises what are the respective rights of Bái Amrit, the plaintiff, and Bái Mánik,

(a) 8 Bom. H. C. Rep. 31 A.C.J. (b) Coleb. Dig. I. Texts 191—193.

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the defendant? It is clear that upon the death of Maheshwar, in Samvat 1913, during the lifetime of his father, Ghelábhái, no portion of it passed to Báí Mánik. She, no doubt, was entitled to get a suitable maintenance out of it, but the property itself vested entirely in the surviving co-parceners, Ghelábhái and his grandson Jivá, unless either of them was by law disqualified to inherit, in which case it vested exclusively in the other. It has indeed been contended by Báí Mánik that deafness from birth and idiocy excluded Jivá altogether from the inheritance; that the whole of the property accordingly vested in Ghelábhái; and that upon his death, it devolved upon her as his heir, Jivá and Báí Amrit being entitled only to maintenance. If her allegations as to Jivá's deafness and idiocy were proved, such would, no doubt, be the result; but they are denied by the plaintiff, and the evidence in support of them has failed to satisfy us, as it has failed to satisfy the court below, that Jivá was either deaf from birth or an idiot. It is unnecessary for us to recapitulate the evidence of the different witnesses which has been reviewed at some length by the Subordinate Judge. The result of it seems to us to be that Jivá, though somewhat hard of hearing, and not by any means a clever boy, did hear what was said to him in a sufficiently loud tone; that he learned to speak; that he was sent to a school, which he attended for about three years; and that when he left it, at the age of 8, he was in the fifth class, and had studied as far as the Second or Third Book of reading. We are, therefore, of opinion that upon the death of Maheshwar, in 1913, the surviving members of the family, Ghelábhái and Jivá, became joint owners of the whole of the family property, and that, upon the death of Ghelábhái, in 1918, it vested solely in the survivor Jivá. Such being the case, it would, upon Jivá's death, in 1921, devolve upon the plaintiff, his widow, Báí Amrit, unless it be shown that the ordinary rule of Hindu law does not apply to this case.

It has been contended for Báí Mánik that, according to the custom of her caste, the property of Jivá, upon his

death, devolved, not upon his widow, Bái Amrit, but upon herself, his mother, and that Bái Amrit is entitled only to maintenance. In proof of such alleged custom our attention is directed to the evidence of several witnesses, which, however, we do not consider to be sufficient. It is urged, indeed, that the existence of such a custom was admitted by members of the caste so far back as half a century ago, and in support of this we are referred to Mr. Borradaile's Collection of Caste Rules. We find in it an answer to Question 6, given to him by certain members of the caste then residing in the city of Surat, to this effect :—"When a person at his death leaves no one but his mother and his wife, the succession devolves to the mother agreeably to the Shástra" (c). This is perhaps enough to lead one to infer that the witnesses, who now speak to the existence of the custom, are not inventing one for the purposes of this suit. But it is by no means sufficient to establish the custom itself; and having regard to the whole of their evidence, and bearing in mind that it is not shown to have ever been recognised by the Courts, that the oldest witness (No. 61, who is 72 years of age,) cannot mention a single case in which it was actually followed, that the other witnesses, who also depose to its existence, have, in stating instances, omitted all mention of the circumstances, or when they occurred, that persons belonging to, or connected with, the families in which the instances are deposed to have occurred have not been called to prove them, and also that the witnesses are not all agreed as to what the custom really is, we are unable to say that it is satisfactorily established; and we are the more inclined to this opinion when we find that other members of the same caste residing at Broach stated to Mr. Borradaile, about the same time, and in answer to the same question, that "If there be no other relation of a deceased man but his wife and mother, they will divide his inheritance equally between them" (d).

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(c) Borr. Caste Rules, Court Library Copy, pp. 14, 273.

(d) Borr. Caste Rules, Court Library Copy, p. 298.

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Such being our view of the evidence on this point, the respective rights of the plaintiff and Bái Mánik are determined by the ordinary rule of Hindu law, which in a case like the present, of what is termed "obstructed heritage," declares the widow of the deceased to be his heir in preference to his mother (e). The Subordinate Judge is clearly wrong in holding that, according to that rule, the mother and the widow are both equally his heirs, and the several texts which he cites in support of his opinion have, to our minds, little or no bearing on the subject. But, although the widow succeeds in preference to the mother, the latter is still entitled to get a suitable maintenance out of the family property. We must, therefore, at the same time that we fully recognize the plaintiff's right, make a proper provision for Bái Mánik's maintenance; and having regard to the amount of the family property in this case, we think substantial justice will be done by our passing the following order, namely, (1) that the defendant Bái Mánik make over to the plaintiff a moiety of the moveable property in her possession, or its value, as found by the Subordinate Judge, retaining the other moiety for her own use; (2) that the family dwelling-house be divided into two equal parts, one of which she is to make over to the plaintiff, retaining the other for herself to live in during her lifetime; and (3) that in the same way the two fields also, Nos. 456 and 362, be divided into two equal parts, one of which she should make over to the plaintiff, retaining the other for her own maintenance.

We, therefore, allow the plaintiff's claim to the extent specified above, and accordingly modify the Subordinate Judge's decree, directing Bái Amrit and Bái Mánik each to pay her own costs, and the former to pay the costs of defendants Nos. 2 to 5 throughout.

Decree accordingly.

(e) Vyav. May., Ch. IV., S. VIII., I., Miták., Ch. II., Sec. I., 2.

[APPELLATE CIVIL JURISDICTION.]

1875.
March 18.*Regular Appeal No. 3 of 1874.*

KRISHNARA'V JAHA'GIRDA'E...*Plaintiff and Appellant.*
GOVIND TRIMBAK.....*Defendant and Respondent.*

Suit by one of two co-sharers to oust a tenant.

Where a suit was brought by one of two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other co-sharer :

Held that the suit was not maintainable, and that the plaintiff could only sue jointly with his co-sharer, though the plaintiff was sole manager of the joint estate.

Umaná v. Purshotam (S. A. No. 379 of 1873) followed.

THIS was a regular appeal from the decision of A. Bosanquet, District Judge of Ahmednagar, in original suit No. 4 of 1872.

The plaintiff, Krishnaráv, brought this suit to recover from Govind Trimbak possession of two fields (Survey Nos. 136 and 137), together with a well and trees standing in No. 136. He alleged in the plaint that as he was willing to cultivate the fields himself, he gave the defendant notice to surrender them. The defence of Govind Trimbak, among other things, was that the plaintiff alone was not competent to maintain the suit, as there was another co-sharer, who did not join in the action. The defendant filed copy of a decree (Exhibit No. 30) passed between the plaintiff Krishnaráv and the other co-sharer (Dámódharráv), in which the latter was held entitled to an equal share in the management of the joint property, including the two fields in question. The Judge, thereon, joined Dámódharráv, the other co-sharer, as co-plaintiff, under the provisions of Section 73 of the Civil Procedure Code. Dámódharráv filed a written statement, and objected that the action had been instituted without his consent, and stated that he was not willing to eject the defendant, Govind Trimbak, so long as he paid the rent. One of the issues raised by the Judge

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TRIMBAK. was, whether the plaintiff alone was competent to maintain the suit. The Judge at first found that issue in the negative, and dismissed the plaintiff's claim. On the application of the plaintiff, however, the Judge, on review, reversed this decision, and awarded the plaintiff's claim on the ground that as the plaintiff was actually managing the property, he could maintain the suit alone.

The appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA's, JJ., on the 15th and 18th March 1875.

Pándurang Balibhadra for the appellant :—Dámodharráv is admitted to be a co-sharer with the plaintiff in the fields occupied by the appellant as a tenant. The plaintiff alone, therefore, cannot sue to oust the appellant, in the absence of, and against the express wishes of, the co-sharer. He cited *Umanná v. Purshotam* (S. A. No. 379 of 1873), in support of his contention.

Ráv Sáheb V. N. Mandlik, contra, relied upon *Sangáppá v. Sáhebáná* (a).

18th March 1875. KEMBALL, J. :—This is a suit brought by one of two co-sharers in certain *inám* villages to recover possession of two fields, some trees, and a well from an admitted tenant. In the course of the suit, the other co-sharer was made a co-plaintiff, and he filed a statement denying the right of his co-sharer to sue alone, and declaring that the suit was brought without his consent, he being desirous of allowing the defendant to remain in possession so long as he paid the rent. The relationship of landlord and tenant is admitted, so that the only issue for disposal before us in this Regular Appeal is whether the plaintiff is entitled to sue in his own name and person to oust the tenant. It appears that, although the Judge has found that the plaintiff alone manages the village, lets out lands, and takes them back at his pleasure, still that right has never been acquiesced in by the co-sharer Dámodharráv, and that only three years ago the plaintiff in this case brought his suit

against Dámodhar to establish his right to manage when a decree was taken by consent, Exhibit 30, in which it was held that the plaintiff had failed to prove that he was the sole manager, and it was directed that in future he should transact the business with the consent of Dámodharráv, providing at the same time for any losses that might accrue in the event of the one acting without the assent of the other. Assuming that the Judge is right, in the face of the award above quoted, in holding that the plaintiff did manage the village in question so as to bind his co-sharer by his acts, we think it impossible to hold that he (plaintiff) is empowered by his position to bring a suit, not only in the absence, but against the express wish, of his co-sharer. In support of the Judge's decree, we have had quoted to us the judgment of this Court to be found at page 141 of the seventh volume of the reports. We do not think, however, that that judgment has any application to the present case, it having been held there that, where a tenant chose to pay a co-sharer other than *the recognized* representative, he was bound at the suit of such representative to pay over again. We need not express any opinion on that ruling, for the question does not arise here. On the other hand, the judgment in S. A. No. 379 of 1873, decided on the 1st April 1874, has been brought to our notice, which exactly meets the present case. In that suit, one of three co-sharers sought to obtain rent and oust a tenant, and the District Court, in reversing the decree of the Court of first instance, held that the plaintiff, as eldest representative manager, could alone maintain his action, but in Special Appeal, it was ruled that the plaintiff could only sue jointly with his co-sharers, and in that decision we concur. We must, therefore, reverse the decree of the District Judge without prejudice, however, to any right which either of these two co-parceners may hereafter, either by voluntary partition or by a partition made in a suit between themselves only, acquire to proceed severally against the defendant to recover the lands in dispute, and we order that the plaintiff do pay the costs throughout.

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March 24.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 66 of 1874.

PRABHA'KAR CHINTA'MAN } *Plaintiff and Appellant.*
DIKSHIT

PA'NDURANG VINA'YAK } *Defendant and Respondent.*
DIKSHIT

Mortgagee in possession—Account.

A mortgagee in possession is liable to account for profits arising from trees planted by himself on the mortgagor's land.

A mortgagee in *personal* possession is, in the absence of any special contract to the contrary, chargeable, with a fair occupation rent, in the case of buildings personally occupied by him for the purpose of residence or carrying on trade or business, and in the case of land personally occupied or cultivated by him, either with a fair occupation rent or with the actual net profits realized from the use of the land.

In ascertaining what those profits are, with which the mortgagee ought to be credited in reduction of his mortgage debt with interest thereon, the mortgagee ought to be credited for his expenses in obtaining produce from the land and a moderate interest on the amount of such expenses.

Principles laid down on which an account should be taken from a mortgagee in possession.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Rātnāgiri, amending the decree of the Subordinate Judge of Guhāgar,

Prabhākar brought this suit against Pāndurang and two others to redeem his share in certain immoveable property, mortgaged by his father for Rs. 121-11-10 in 1835 and 1838. Pāndurang, the principal defendant, answered that he had no objection to allow redemption on being paid the amount that might be found due.

The Subordinate Judge, on taking account, found that the net profits of the mortgaged property during the period of the mortgage amounted to Rs. 404-13-8, including profits arising from trees planted by the defendant (mortgagee) after the date of the mortgage. He found that the interest on the mortgage amounted to Rs. 496-14-0 due to the

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defendant. The Subordinate Judge, therefore, deducting the amount of profits from the amount of interest, passed a decree in favour of the defendant for Rs. 121-11-10 as principal and Rs. 92-0-4 as interest, total Rs. 213-12-2, on payment of which the plaintiff was to redeem the property from the defendant. In appeal (which was preferred by the defendant), the Assistant Judge reduced the amount of the net profits of the land during the period of the mortgage to Rs. 70-4-1, and held the plaintiff entitled to redeem, on payment to the defendant of Rs. 548-5-9, of which Rs. 426-9-11 was the amount of interest. The Assistant Judge reduced the amount of net profits, because he was of opinion that the mortgagee ought not to be obliged to account for the profits of trees which he himself had planted, after entering into possession of the mortgaged property. He observed :—

“ Now, I do not at all see why the defendant should be obliged to account for the profits of trees he himself planted. A mortgagee is not bound to improve the land, and, if he does so, his mortgagor gets the benefit of the improvements when he redeems the land. In this case, it is very doubtful, indeed, whether the trees are planted in the share that was mortgaged. What was mortgaged was an undefined share of land, since there has been no division of the field, nor indeed has there been any division of the trees, but at the time of the mortgage, in 1835, the plaintiff's share was only seven trees (as is stated in Exhibit No. 10), and only these seven trees were mortgaged at that time and no more in 1838 by the deed No. 9. There were more trees in the whole field, as the defendant admits, but they did not belong to the plaintiff, as he admits in the deed. Of course, I do not determine at all that in the trees planted subsequently to the mortgage, the plaintiff has no share ; what I think and hold is, that the plaintiff cannot call upon the defendant to account for profits of trees that were not mortgaged and were not even in existence at the time of the mortgage, but were planted subsequently to it by the defendant, it may well be in his portion as a co-sharer in the land. The profits must be confined to the profits of what was mortgaged and was in existence at the time of the mortgage.”

1875. In special appeal, it was principally contended that the account was taken on a wrong basis.

PRABHA'KAR CHINTA'MAN DIKSHIT v. PA'NDURANG VINA'YAK DIKSHIT. The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Rāv Sāheb V. N. Mandlik for the appellant.

Bhairavnāth Mangesh for the respondent.

The Court made the following interlocutory order, remanding the case to the lower court to prepare a fresh account on the principles laid down.

WESTROPP, C.J.:—The Assistant Judge, in taking the accounts with regard to profits arising from trees, has fallen into the error that the plaintiff is entitled to credit for profit arising from such trees only as were standing on the land at the time of the mortgage. There seems to be no good reason for holding that a mortgagee in possession would not be liable to account for profits arising from trees planted by himself on his mortgagor's land, as for profits arising from rice, maize, or other crops sown originally by the mortgagee. There are two modes, in either of which the mortgagee in personal possession would, in the absence of any special contract to the contrary, seem to be chargeable. The first and simpler mode would be that the Court should fix a fair occupation rent for the use and enjoyment of the land or buildings mortgaged. In the case of buildings in the possession of the mortgagee, personally occupied by him for the purpose of residence or carrying on trade or business, a fair occupation-rent would seem to be the only satisfactory mode of charging him. In the case of land personally occupied or cultivated by him, he might be charged either in that way, or with the actual net profits realized by him in using the land. But in order to ascertain what these profits should be, with which the mortgagor ought to be credited in reduction of his mortgage debt and interest thereon, we think that, not only ought the mortgagee to be allowed credit for moneys expended in obtaining produce from the land, such as the cost of seed or young trees, and the fair expenses of cultivation, but also a moderate interest, say

six per cent. per annum, on the capital thus employed ; for it would not be fair that the whole of the profitable results of the employment of that capital should be applied in reduction of the mortgagor's debt. After deducting from the gross produce of the land the Government assessment, or other lawful charges payable in respect thereof, the cost of seed, &c., the proper expense of labour and cultivation and a fair sum for interest on the capital employed in procuring such seed and carrying on such cultivation, the surplus profits ought to be carried to the credit of the mortgagor and in reduction of his debt and interest. We are not, however, to be understood as maintaining that a mortgagee has the right to charge a mortgagor with improvements made without the assent of the latter, or to charge him with interest on capital, where such capital was misapplied by the mortgagee, or not resulting in sufficient produce to cover the interest upon it. No doubt, in the case of land (as well as in that of buildings) in the personal occupation of the mortgagee, it will often be the more simple course for the Court to ascertain what would be a fair occupation-rent, and thus to get rid of the account of the expense and profits of every crop which the mortgagee may bring into existence on the land. Where a mortgagee enters into possession simply by taking the rent from the tenants in actual occupation of the land or buildings, the subject of the mortgage, the account of rents and profits can be easily taken against him. Circumstanced as this particular case is, we think that we must require the Assistant Judge to ascertain and report to this Court what was the net profit made by the defendant on trees planted by himself, on the A'gar land, during the time in which he has been in possession of the plaintiff's undivided one-fourth of that land. In ascertaining this, the Assistant Judge should make allowance to the defendant for the cost of those trees and the expense of the cultivation thereof, and six per cent. per annum as interest on such capital as was engaged by the defendant for these purposes, and should credit one-fourth of the balance of profit to the plaintiff in reduction of the mortgage debt for principal and interest due to the defend-

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1875. ant. It is necessary that this Court should point out that the Assistant Judge has fallen into a fallacy in saying that "it is very doubtful whether the trees are planted in the share that was mortgaged." He had previously found that there had not been any partition of the land, and that the plaintiff's share was, therefore, an undivided share; that being so, the plaintiff could not be said to have a share in any one part of the land more than any other part of it, but he was entitled to an undivided fourth part of it, and is accordingly entitled against his co-parcener and mortgagee, the defendant, who was in possession of the whole, to credit for a fourth of the net profits of the whole. The Assistant Judge is to be at liberty to take such fresh evidence as may seem to him to be desirable and necessary for the purposes of this inquiry. The Court reserves all further directions and costs.

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On the 15th January 1875, the following report was made by A. D. Pollen, who in the meantime succeeded H. J. Parsons as Assistant Judge at Ratnágiri:—

"Having made the calculation in the manner indicated by the High Court, I find that the profits amounted to Rs. 229-5-5.

"On the application of the parties, evidence was taken by commission on the spot. The commission, by consent, was issued to the Mahálkari of Guhágär. His very carefully written report is recorded, No. 12, in this inquiry. At first the parties did not produce any evidence before him, and he, therefore, took the evidence of four independent and skilled witnesses. Subsequently other witnesses were examined at the instance of the parties themselves. The result of the inquiry is summed up in the two memoranda, Exhibits 10 and 11.

"The number of trees planted was found to be 58. They must have been all planted about the year 1838. The gross profits arising from the trees between that period and 1870 has been estimated at Rs. 1,817-8-0, of which sum, Rs. 257-8-0 were referred to miscellaneous income, such as leaves, firewood, &c., and Rs. 1,507 to the actual value of the fruit.

The calculation was made after personal inspection, and separate estimate of each individual tree and its correctness has been admitted before me by the pleaders on each side.

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"In estimating the expenses, the Commissioner has discriminated between the expenses incurred in cultivating the trees up to the time when they commenced to bear, and the expenses since they began to yield fruit. He considered that interest was to be calculated on the former kind of expenses only, and not on the latter. This appears to me to be an error into which he was led by the Maráthi translation of the expression, 'expenses of cultivation,' which I take to mean the ordinary expenses which must be incurred each year to keep the trees in a proper condition.

"The trees were not capable of producing fruit for ten years after being planted. The preliminary expenditure during that period may be taken as amounting to Rs. 166-14-0.

"This sum includes the original price of the plants, of planting and digging, of hedging and fencing, of a bullock for watering, bullock's food, kit, and labour.

"I consider this estimate very correct and fair. The parties of course argue that the items should be slightly varied one way or the other, to suit their own interests, but, on the whole, they have no valid objection to offer. Interest on the capital so expended from year to year amounts, at six per cent., to Rs. 314-5-2, so that the capital expended on the trees for the first ten years and the interest on the same together amount to Rs. 481-3-2.

"After the trees began to bear, they required to be watered and, as a matter of fact, were watered for fifteen years. The expenses for this time, including bullocks, kit, food, and servant, could not have been less than Rs. 204, the details of which for the fifteen years are as follows :—Two bullocks Rs. 24 ; leather kit for ditto Rs. 45 ; food for ditto Rs. 75 ; servant Rs. 60. The full details of each separate year's expenses are shown in Exhibit 11. The Commissioner did not calculate any interest on this sum, but the order of the High Court requires this to be done. I find that the total

1875. interest from year to year amounts to Rs. 214-15-0 (*vide*
 PRABHA' KAR Maráthi *yád* annexed, marked Z).
 CHINTA'MAN
 DIKSHIT

"Principal and interest together come to Rs. 418-15-0,
 v. which added to the principal and interest on the first ten
 PA'NDURANG years' expenditure, being the total expenditure (with
 VINA'YAK interest) of the first twenty five years, to Rs. 900-2-2.
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"No water has been supplied to the trees for the last ten years or so, and there has, therefore, been no expenditure of capital on them in that period. I have only, therefore, to deduct Rs. 900-2-2 from the gross profits to get the net profit. The result is Rs. 917-5-10, of which the plaintiff's fourth share would be Rs. 229-5-5.

"I, therefore, find on the point referred to me that the net profit was Rs. 229-5-5."

On the receipt of the above report, the case came on for final disposal before the same bench on the 24th March 1875, when the plaintiff was declared entitled to redeem and recover possession of his share in the property on payment by him to the defendant of Rs. 368-8-4 instead of the sum of Rs. 548-5-9, first awarded by the lower court.

Decree amended.

[APPELLATE CIVIL JURISDICTION.]

March 24.

Regular Appeal No. 54 of 1873.

HIMMATSING BECHAR-	}	<i>Appellant (Original Defen-</i>	
SING.....			<i>dant).</i>
GANPATISING, styling	}	<i>Respondent (Original Plain-</i>	
himself, the son of			<i>tiff).</i>
HIMMATSING.....			

Hindu Law—Maintenance.

A suit for maintenance out of ancestral estate by a Hindu son lies against his father where the property in the hands of the latter is impartible.

Quære :—Whether a like suit lies where the son might sue for partition.

THIS was an appeal from the decision of W. H. Newnham, Judge of the District of Ahmedabad.

The appeal was heard by WESTROPP, C.J., and KEMBALL, J. 1875.

Starling (with him *Lang* and *Dhirajlál Mathurádás*, Government Pleader,) for the appellant.

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Branson (with him *Shántarám Náráyan*) for the respondent.

The facts and arguments, in so far as they are material for the purposes of this report, appear from the following extract of the Court's judgment delivered by

WESTROPP, C.J.:—The plaintiff Ganpatsing sued Himmatsing, the Thákur of Saròd, to establish his right to receive maintenance, alleging that he was the son of the defendant by his wife Sáheb Ráni. He also claimed arrears of maintenance for six years. The estate of Himmatsing being placed under management in conformity with Act XV. of 1871, the manager was also made a defendant under Section 25 of the Act.

Himmatsing pleaded, *inter alia*, that the plaintiff was not his son, and even if he were, he could not by custom claim any maintenance.

The District Judge of Ahmedabad, Mr. Newnham, after a very careful consideration of the evidence produced before him, came to the conclusion that the plaintiff was the lawful son of the defendant Himmatsing by his wife Sáheb Ráni, and that he had a legal claim to be maintained by his father. He accordingly decreed to that effect, and directed that the manager, having regard to the magnitude of the estate and its incumbrances, should decide (subject to the control of the Government) what amount the plaintiff was to receive as arrears of maintenance and what he was annually to receive in future.

In the appeal before us, we have to consider two objections. It has been contended on behalf of Himmatsing, who alone appears in this Court, that a son could not sue his father for maintenance. In support of this contention, it is urged that a Hindu son has an equal share with his father in ancestral

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property (a proposition which in this particular case, it will be presently seen, is inconsistent with an admission of the defendant), and that the plaintiff should, therefore, be left to enforce his rights, if he can, by a partition suit. A custom has also been attempted to be set up to prove that the plaintiff should be maintained out of the allowance settled on his mother. It has, as we think, been very properly conceded, on behalf of the defendant Himmatsing, that the estate in question is impartible, being one to which the law of primogeniture applies; and no authority was cited, either in the Court below or in this Court, to show that, where a son could not enforce a partition with his father, he was prevented from suing the latter for maintenance. We are of opinion that the alleged custom is not proved, and that, on the defendant Himmatsing's own theory, that the property is impartible, the disowned son would have no remedy except a suit for maintenance. We say nothing as to the right of a son to sue for maintenance where he might sue for partition. (a)

Note.—His Lordship, on the 31st March following, reviewed the evidence, and came to the conclusion that the District Judge was right in holding that the plaintiff was the lawful son of Himmatsing by his wife Sâheb Râni. The decree of the lower court was, therefore, affirmed in so far as it declared the status of the plaintiff and his right to be maintained by the defendant, but varied in so far as it awarded arrears of maintenance for six years. The High Court, in consideration of the incumbrances on Himmatsing's estate, gave the plaintiff arrears only from the date of the filing of the plaint at a rate to be fixed, under the control of the Governor of Bombay in Council, by the manager, who was also to fix the amount of future maintenance.

(a) See, on that point, Special Appeal No. 394 of 1872, decided by WESTROPP, C.J., and MELVILL, J., on 20th April 1874, the judgment recorded by WESTROPP, C.J., wherein it is laid down that amongst the male members of an ordinary Hindu undivided family, a suit by one co-parcener against the others for maintenance would be unsustainable. He would be entitled to sue for a share, but not for maintenance, unless indeed he were illegitimate, deformed, or idiotic, or suffering from some other disability to inherit, in which case he would not be a parcener entitled to an equal share with the other members of the family, but only a person entitled to a maintenance.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 175 of 1873, Appeal No. 257.*1875.
January 14.DAYA'L JAIRA'J *Plaintiff and Respondent.*KHATA'V LADHA' and other
defendants (who did not
appeal.) *Defendant and Appellant.**Limitation—Act XIV. of 1859—Act IX. of 1871, Sections 1 and 22—
“Instituted”—“Commenced”—Contribution—Partnership—Account.*

Quære:—Whether the word “commenced” in Section 22 of Act IX. of 1871 is equivalent to the word “instituted” in Section 1, and whether Section 1 does not exclude from the operation of the Act all suits instituted before 1st April 1873, even as to defendants added after that date.

Supposing the provisions of Section 22 of Act IX. of 1871 to apply to defendants added by amendment subsequently to 1st April 1873, in a suit instituted before that date, such added defendants will, under the terms of that section, and if that section does not apply, then under a general principle of law, be allowed to reckon the period of limitation on which they rely from the date at which they were added, but the periods of limitation provided by Act IX. of 1871 do not necessarily apply to defendants so added.

The plaintiff and three of the defendants, being four members of a partnership, consisting of seven persons, borrowed, in January and February 1865, on account of the partnership, from the Commercial Finance and Stock Exchange Corporation, two sums of Rs. 1,21,614 and Rs. 1,08,000, for which they gave their joint and several promissory notes, and shortly afterwards two of the partners retired, leaving the plaintiff and the four defendants alone constituting the firm. On 27th September 1865 the plaintiff and first defendant were sentenced to transportation for life, and on 15th April 1867 one of the other defendants became insolvent. On 25th April 1867 the Liquidators of the Commercial Finance and Stock Exchange Corporation obtained a decree against the plaintiff and the three defendants who had joined in the making of the promissory notes for the amount due on their joint and several promissory notes and costs. In March 1868 the immoveable and moveable property of the plaintiff and the moveable property of the first defendant were sold in execution, and the whole of the proceeds of the plaintiff's immoveable property, together with the balance of the proceeds of the moveable properties of the plaintiff and first defendant, after satisfying thereout two prior decrees against them, were applied in part satisfaction of the decree of 25th April 1867, and the moneys so recovered were distributed to the shareholders by the liquidators, who, however, retained in their

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hands such portion as would have been payable in respect of the shares held by the judgment-debtors, and thus the whole decree was satisfied, leaving a balance of Rs. 25,212. The distribution of assets was made on 3rd April 1869, and the final dividend to shareholders other than the judgment debtors paid on 3rd August 1869. The two defendants other than the first and the insolvent took the benefit of Act XXVIII. of 1865, and obtained their discharge in April and December 1869. The plaintiff, therefore, sued the first defendant alone on 18th March 1873, as contributory for the satisfaction of the joint decree, but subsequently, by amendment made on the 6th February 1874, added the other defendants and prayed for a decree that he was entitled to receive and appropriate the balance of Rs. 25,212, and that the first defendant should pay to the plaintiff the balance of the moneys paid by him in excess of his share in satisfying the decree of 25th April 1867, with interest, after deducting three-fourths of the sum of Rs. 25,212, or that, if necessary, the partnership accounts might be taken, and the plaintiff be paid such sums as might be found to be due to him :

Held—1st.—That the period of limitation as to all the defendants was that provided by Act XIV. of 1859, whether the suit was to be treated as one for a partnership account, or one for contribution of an ascertained sum.

2nd.—That as to the first defendant the period of limitation was to be reckoned back from 18th March 1873.

3rd.—That as to the added defendants the period of limitation was to be reckoned back from 6th February 1874.

4th.—That the giving of the promissory notes was not a partnership transaction so as to debar the plaintiff from a suit for contribution without asking for a general account of the partnership dealings.

5th.—That the first defendant, having by his written statement, pleaded that if a general partnership account were taken, he would be found not to be indebted to the plaintiff in respect of the contribution claimed, could not also plead the Limitation Act as a bar to the taking of such account.

6th.—That the plaintiff's cause of action arose in April 1868, when his property was sold and applied in satisfaction of the joint decree of 25th April 1867, and not on the date of the decree itself.

THIS was an appeal from the decree of Sargent, J. The plaintiff originally sued the respondent alone to recover the sum of Rs. 76,536-7-2, with interest from the 1st March 1868, as money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request, and for interest on money due from the defendant to the plaintiff, and for money found to be due from the defendant

to the plaintiff on an account stated between them. The
 plaint was filed on the 18th March 1873, and the particulars
 of claim annexed to it showed that the amount claimed,
 Rs. 76,536-7-2, was made up of the item of Rs. 21,212, unpaid
 contribution payable by the defendant towards the sum of
 Rs. 2,48,558-8-5 (the amount of a decree in Suit No. 985 of
 1866, with interest and costs), and the item of Rs. 55,324-7-2,
 being the moiety of the excess paid by the plaintiff on account
 of such decree. The plaintiff, therefore, did not ask for an
 account, but treating it as unnecessary, sought only
 for payment by the defendant of an ascertained sum of
 Rs. 76,536-7-2, as being still due from him as contributory
 for the satisfaction of a joint decree. The defendant filed
 a written statement in August 1873, insisting on the Limita-
 tion Act as a bar to the suit, alleging that he had already
 paid all that he was liable to pay, that the accounts of the
 partnership were still unadjusted, and the other partners
 or their representatives were necessary parties to the suit,
 and that an account should be taken, under the direction
 of the Court, of the partnership dealings and the amounts
 paid by the plaintiff and defendant respectively in satisfac-
 tion of the decree in Suit No. 985 of 1866. The plaint was
 thereupon amended on the 6th February 1874, under an
 order of the previous day, by making Henry Gamble, (As-
 signee in Insolvency of the estate of Dinshá Ardesir Dávar),
 Bhagwandás Parshotamdás, and Tulsidás Devji, parties
 defendant. The amended plaint was much extended in the
 way of statement, many of such statements being to the
 same effect as those in the written statement, filed in answer
 to the original plaint, and prayed that it might be decreed
 that in the events which had happened, the plaintiff was
 entitled to receive one-fourth of a sum of Rs. 25,212 depo-
 sited in the hands of the Accountant General, and forming
 part of the dividends on certain shares belonging to the
 partnership, and that the remaining three-fourths might also
 be received and appropriated by the plaintiff in the manner
 in the plaint mentioned, that the Accountant General might
 be ordered to pay the same to the plaintiff, and that the

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At the hearing of the suit, none of the defendants added by amendment appearing, either by counsel or in person, nine issues were framed, of which the first two were :

“ Whether the plaintiff’s claim is barred by the Limitation Act,” and “ whether the plaintiff is entitled to an account, as between himself and the first defendant, Khatáv Ladhá, of the partnership transactions referred to in the plaint, supposing the suit to be barred as against the other defendants, viz., Henry Gamble (the Assignee in Insolvency of one Dinshá Ardesir Dávar), Bhagwándás Parshotamdás and Tulsidás Devji.”

By his decree of the same day the learned Judge who heard the suit ordered a reference to the Commissioner to take an account of the dealings and transactions of the partnership in the pleadings mentioned, and reserved further directions and costs until after the report of the Commissioner should have been made. Or, in other words, he found the first issue in favour of the plaintiff and against all the defendants, and reserved his findings on the other issues till after the accounts should be taken.

The defendant, Khatáv Ladhá, appealed against the decree on, in substance, the following grounds : That the claim of the plaintiff to the accounts decreed ought to have been held to be barred by the Limitation Act ; and that, as at any rate, such claim as against the other defendants ought to have been held to be barred, and they were necessary parties to an account as against the defendant Khatáv Ladhá, the plaintiff was not entitled to any account at all of the partnership dealings. The question then for the consideration of the Appellate Court was as to the application to the suit of the Limitation Act.

The appeal was argued before BAYLEY and GREEN, JJ.

Lang and Inverarity for the appellant.

Scoble, A. G., and Latham for the respondent.

The judgment of the Court was delivered by

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GREEN, J., who, after reviewing the facts stated above, proceeded as follows :—As no evidence was given at the hearing of the suit the facts which we assume as established must be collected from the statements of the plaintiff and written statement, so far as uncontradicted by the other side (and on this footing the learned counsel for the appellant stated in the argument of the appeal that they were willing the matter should be argued), and from certain other admissions, stated to have been made at the hearing below, by the respective counsel who appeared for the parties, and which were repeated at the hearing before us, and we think it desirable to specify those facts which we so assume to be established. In the year 1864 a partnership was formed for the purpose of speculating in shares (whether in shares generally, or only in the shares of the Commercial Finance and Stock Exchange Corporation, is a point in difference between the parties), such partnership consisting of the plaintiff, the defendants Khatáv Ladhá, Tulsidás Devji, and Bhágwándás Parshotamdás, Dinshá Ardesir Dávar, one Robert Taylor, and one Prágji Parshotamdás. Shortly after the formation of the partnership, about the 20th February 1865, Prágji Parshotamdás retired from the partnership, and Robert Taylor made over his share to Dinshá Ardesir Dávar. In January and February 1865, the plaintiff, the defendants Khatáv Ladhá and Tulsidás Devji, and Dinshá Ardesir Dávar (being then Directors of the Commercial Finance and Stock Exchange Corporation) borrowed from the Corporation for and on account of the partnership two sums of Rs. 1,21,614-8-0 and Rs. 1,08,000, and to secure the same gave their joint and several promissory notes, dated respectively 16th January 1865 and 2nd February 1865, and deposited 5,107 shares of the Corporation's own shares, the property of the partnership. On 27th September 1865 the

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Rs. 13,109-4-9, were applied to the extent of Rs. 14,725 in satisfaction of the claims of the Kutch Financial Association under their decrees in Suits Nos. 965 and 984 of 1866, respectively, and the balances of those sums of Rs. 10,144-4-5 and Rs. 13,109-4-9 (viz., Rs. 2,781-14-5 belonging to the plaintiff and Rs. 5,746-10-0 belonging to the defendant Khatáv Ladhá, aggregating Rs. 8,528-8-5), were, together with the sum of Rs. 1,28,750, the proceeds of the immoveable property of the plaintiff, applied in part satisfaction of the claim of the Commercial Finance and Stock Exchange Corporation under their decree in Suit No. 985 of 1866 against the plaintiff, the defendants Khatáv Ladhá and Tulsidás Devji and Dinshá Ardesir Dávar. The order for payment by the Sheriff to the solicitors of the plaintiffs in the suits in which the aforesaid attachments were issued was made on the 28th April 1868. The Liquidators of the Commercial Finance and Stock Exchange Corporation having so recovered the sums of Rs. 1,28,750 and Rs. 8,528-8-5, proceeded to distribute the same to the shareholders, but retaining in their hands such portion as would have been payable in respect of the shares held by the judgment-debtors, namely, the defendants in Suit No. 985 of 1866, and by such retention the whole of the decree in the said suit became satisfied, leaving as a balance (we assume, though it is not expressly so stated,) the sum of Rs. 25,212, stated to be now in deposit with the Accountant General, and to which a portion of the prayer of the amended plaint is directed. This distribution of assets was, it is admitted, made on the 3rd April 1869, the final dividend to shareholders other than the judgment-debtors having been paid on the 3rd August 1869, and in such manner the decree in Suit No. 985 of 1866 was fully satisfied. As for Tulsidás Devji and Bhagwándás Parshotamdás, it is stated by the amended plaint that they had taken the benefit of Act XXVIII. of 1865, and obtained their discharges respectively on the 5th April 1869 and the 11th December 1869, and that the plaintiff is advised that they having included the transactions, the subject-matter of the present suit, in their accounts filed under the said Act, are not liable in respect

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thereof. He has, however, in compliance, we presume, with the contention of the defendant Khatáv Ladhá, in his written statement, made Bhagwándás Parshotamdás and Tulsidás Devji parties defendant. Under the aforesaid circumstances the plaintiff contends that, as nothing can be recovered from the estate of Dinshá Ardesir Dávar, he is entitled to recover from the defendant Khatáv Ladhá the sum of Rs. 76,536-7-2, made up as mentioned in the particulars of demand referred to.

The first question is whether Act XIV. of 1859 or Act IX. of 1871 applies to the suit. So far as the first defendant Khatáv Ladhá is concerned, there is no doubt that the first-named Act applies, and not Act IX. of 1871, as the suit was instituted against him on 18th March 1873, and Section 1 of Act IX. of 1871 provides that Act is not to extend to any suit instituted before 1st April 1873, and it was not disputed that under Act XIV. of 1859 the period of limitation would have been six years. But it was insisted that as the defendants, other than the defendant Khatáv Ladhá, became parties to the suit after 1st April 1873, namely, on 6th February 1874, and that as by virtue of Section 22 of Act IX. of 1871 the suit, so far as they were concerned, was instituted after the 1st April 1873, then that the latter Act applied to them and being a bar to the suit as against them according to the periods of limitation applicable to the case under the last mentioned Act, and they being necessary parties to the suit against the defendant Khatáv Ladhá, the suit could not be maintained against such last mentioned defendant. The section referred to, so far as it is material, is as follows: "When after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have commenced when he was so made a party." This section, it is to be observed, does not say the suit as against an added defendant shall, as regards him, be deemed to have been *instituted*, but *commenced* at the time of his so being made a party. Without, however, relying too strongly on this distinction, it seems to us that the reasonable construction of Section 22 is that a defendant added by

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amendment is to be allowed to count the period of limitation on which he relies as a bar to the suit (whatever that period of limitation may be) as running not merely down to the time when the suit to which he is added as a defendant was originally instituted, but also down to the time when he is added as a defendant. This, as indeed appears from the case of *Kaj Kishoree Dossee v. Buddun Chunder Shaha* (a), cited by one of the appellant's counsel, had been held to be the law with reference to Act XIV. of 1859, independently of Act IX. of 1871, and the object of enacting the section in the latter Act was probably to leave no doubt on the point. The section, however, supposing it to apply at all (*i.e.* supposing Section 1 of Act IX. of 1871 not to exclude the operation of the Act upon all suits instituted before the 1st April 1873, even as to defendants added after that date), does not say that when a defendant has been added the periods of limitation provided by Act IX. of 1871 are to apply; it says nothing expressly as to *what* period of limitation is to apply. The construction of Section 22 of the later Act contended for by the appellant's counsel might, as it appears to us, if adopted, lead to consequences which cannot be supposed to have been intended by the legislature, that inasmuch as by the later Act the periods of limitation are in many cases considerably shorter than those provided by the earlier one, different periods of limitation would be applicable to claims against several persons otherwise jointly liable in respect of the same subject-matter. We were informed, at the hearing of this appeal, that the learned Judge who heard the suit considered that the periods of limitation provided by Act IX. of 1871, and not those provided by Act XIV. of 1859 applied in the case of the added defendants. He considered, however, that under the latter Act also the period of limitation to a suit of the nature of the present one was, as before, six years. We are of opinion that as to all the defendants the period of limitation in a suit of this nature, whether it is to be treated as a suit for a partnership account, or as a suit for contribution of an ascertained sum towards a joint decree, is that

(a) 6 Cal. W. R. 298 Civ. Rul.

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provided by Act XIV. of 1859, viz., six years ; that as to the defendant Khatáv Ladhá such period is to be counted back from the 18th March 1873, but that as to the added defendants having regard to Section 22 of Act IX. of 1871, if applicable, and if not, on a principle of law independent of that section, such period is to be counted back from 6th February 1874.

The next point for consideration then is, when did the cause of action arise ? With reference to this the contention of the appellant was that the suit could be treated only as one for a partnership account, and that the cause of such suit arose on the dissolution, *ipso facto*, of the partnership upon the conviction and sentence of the plaintiff and the defendant Khatáv Ladhá, on 27th September 1865. We do not, for reasons which will hereafter appear, consider it necessary to decide when the cause of action ought to be deemed to have arisen, had the present been a suit exclusively or primarily for the taking of the partnership account, nor whether the dissolution of the partnership first took place on the occasion of the conviction and sentence of the plaintiff and the defendant Khatáv Ladhá in September 1865, or on the occasion of Dinshá Ardesir Dávar becoming insolvent in April 1867. It was contended that a suit for contribution between partners is not maintainable except in the form of a suit for a general partnership account, and the case of *Sadler v. Nixon (b)* was relied on. This case, as appears from the observations in Lindley on Partnership, where it is mentioned, and from the other cases there cited, has not been considered wholly satisfactory. The general principle, no doubt, is well established where the transaction, in respect of which the right to contribute is sought to be enforced, was a partnership transaction. But was that the case here ? At the time the loans were obtained from the Commercial Finance and Stock Exchange Corporation, and at the time the promissory notes were given as security, the partnership consisted of seven persons. The loans, however, were made to,

and the notes given by, four only of those persons, viz., the plaintiff, Dīnshā Ardesir Dávar, and the defendants Khatáv Ladhá and Tulsidás Devji. Now *Sedgwick v. Daniell* (c) is a distinct authority that where three persons, being shareholders in a Joint Stock Mining Company (which being unincorporated was, and was treated as, an ordinary partnership), had given a joint and several promissory note to secure moneys advanced to the Company by a third party, and one of the three had paid more than his share, he was entitled to sue for contribution against another of them, notwithstanding that the money was advanced for the purposes of the partnership, and notwithstanding the relationship of partners between the plaintiff and defendant. It was considered by the Court that the promissory note being signed by some only of the shareholders of the Company, must be treated as a transaction separate and apart from the partnership. Bramwell, B., says (d) : " But if two or three members of a partnership, not being the whole, think fit to enter into a separate obligation to a third party, upon the security of which he advances money to the partnership, each being liable to pay the whole and bound to indemnify the others against the payment of more than their shares, that cannot be considered as a partnership transaction." We are of opinion that in the present case the loans to the four makers of the promissory notes, though for and on behalf of the partnership, and the giving of the promissory notes, cannot be considered as a partnership transaction in the sense that it cannot be made the subject of a suit for contribution without also asking for a general account. That a suit for recovery of a share of a partnership asset received by one partner after the dissolution of the partnership may be maintainable, even where the right to a general partnership account may have been barred by the Statute of Limitation, is supported by the opinions of at least three of the four learned Lords who took part in the decision of *Knox v. Gye* (e). There a partnership between Gye and Thistlethwaite

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(c) 2 H. and N. 319. (d) *Id.*, p. 323.

(e) L. R. 5 Eng. and Ir., App. 656.

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had been dissolved by the death of the latter in December 1854. Some years afterwards (the case states in 1862) a sum of £2,500 was received (under a judgment recovered against one Hughes) by the surviving partner Gye, which would have been part of the partnership assets. A bill was filed in October 1864 by the plaintiff, in the character of executor and legatee of Thistlethwaite, praying for accounts of the partnership from 14th March 1851 to the time of taking the accounts, that the partnership between Gye and Thistlethwaite might be directed to be wound up, and the debts of the partnership paid, that an account might be taken of what was due to the plaintiff in respect of his share of a sum of £12,000 (the capital brought in by Thistlethwaite in 1853), including the whole of the judgment-debt due from Hughes and interest, and also of the profits of the partnership between Gye and Thistlethwaite. This bill was dismissed on appeal to the then Lord Chancellor, Lord Chelmsford, on the ground that it was barred by the Statute of Limitations, and his decree was affirmed by the House of Lords, the then Lord Chancellor, Lord Hatherley, who had heard the case originally as Vice Chancellor, dissenting at any rate from the reasons given by Lord Westbury for affirming the decree. Of the four learned Lords who addressed the house, three, viz., Lords Westbury, Colonsay, and Chelmsford, were of opinion that the suit was barred. It is to be observed in the first place that the judgment is based on the words of 19 and 20 Vic., Ch. 97 Section 9, which provides that no action of account, the cause of which arose more than six years before suit, shall be considered as liable to be sued upon after such six years "by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." Lord Westbury appears to have based his decision on this, that the money received from Hughes having been received after the lapse of six years from the dissolution of the partnership by the death of Thistlethwaite in 1854, did not revive the right to an account once taken away by the statute by the lapse of such period of six years. His opi-

nion rather seems to have been that had this sum been received within six years from the dissolution (and this *mutatis mutandis* is the case with regard to the present suit, as the over-payments by the plaintiffs in 1868 were of course within six years from the dissolution of the partnership, whether taking place in 1865 or 1867), the right to an account would have been kept alive. Lords Colonsay and Chelmsford, on the other hand, deal with the case on the footing that the sum recovered from Hughes was received within six years from the death of Thistlethwaite, and hold that the right to an account was nevertheless barred. The Lord Chancellor in dissenting from the views expressed by Lord Westbury, lays down some principles which we consider are very applicable with regard to the present case. He says (f):—"I apprehend that the right view to take of the matter would be this: If the partner who has insisted, and who has a right to insist, upon the benefit of the *Statute of Limitations*, says to the executor of the deceased partner, I am ready to pay you your moiety (that is, if the share should be a moiety,) of those assets which I have received, but I decline to enter into any account that is barred. I concede (as is here done by Mr. Gye) that your testator was once a partner with me. I concede that he was, as my partner, entitled to a share. I concede that I have only received this money by right of the partnership, and that except for the partnership, I could not have received it; conceding that, I am willing to pay you that which is your own, but further than that I will not go; and although I have received this sum and am ready to hand it over to you, holding, as I must, as trustee for you in respect of your interest in the partnership, I will not go back to the partnership accounts, which I say are all settled, and as to which there are no accounts between us. I think Mr. Gye would have a right to say so, but he does not. He says, on the contrary, you are a debtor to me. I believe he says that, and he has a right to say so, I apprehend that it is he who requires the account in order to retain the assets, for he must admit an account to be

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necessary in order to enable him to retain the assets. That is my view of the case. I confess I have not heard anything that justifies me in abandoning that view beyond a proposition which is to me so novel that I cannot accede to it, namely, that there is no fiduciary relation at all between a surviving partner and the executors of a deceased partner. I cannot accede to that, and not acceding to it, it appears to me that Mr. Gye had only one of two courses open to him, viz., that of handing over the money he had received from Mr. Hughes, or the deceased partner's share of it, to the executors of the deceased partner, assuming that all accounts had been settled up to that period, or to say 'I shall demand an account, and show by an account that the whole of that money is mine.' For anything that appears that might have been the actual result." Lord Colonsay says (g):—"The kind of suit we are now dealing with is a suit for an account of the whole partnership concerns. I do not say that if a sum is unexpectedly recovered after the lapse of six years the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind of suit demand a share of the particular sum so recovered. But I do not think that a suit such as the present suit, demanding an account of the whole partnership concerns, can be brought against the surviving partner after the lapse of more than six years from the period at which he first became liable to be convened in such a suit." And Lord Chelmsford says (h):—"There may be a difficulty in determining what is the right of an executor of a deceased partner where he has allowed the *Statute of Limitations* to run against his claim to an account, and a debt has been recovered by the surviving partner after the six years have elapsed. But this is a difficulty occasioned by his own laches, and I see no reason, if he thinks that his interest in the sum received has not been absorbed by its application to satisfy debts due from the partnership, why he should not have a right to sue for his share in this sum (a very different thing from a suit for an account of all partnership trans-

(g) *Id. Ib.*, p. 678.(h) *Id. Ib.*, p. 687.

actions), the surviving partner being at liberty to defend himself by alleging and proving that the whole of the sum received had been applied, or was applicable, to the payment of partnership liabilities."

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The present case may be considered as somewhat converse to that suggested by the three learned Lords whose judgments we have cited, viz., the plaintiff, instead of claiming a share of partnership assets received by one partner after a dissolution, the right to an account generally being supposed to be barred, claims to be repaid the excess of the moneys paid by him, under a joint decree against him and three other of the partners in respect of moneys borrowed on account of the partnership, over the amount which the plaintiff was bound to pay as between him and the three co-partners who joined in the notes. His suit, as originally framed, was confined to this object. To a claim so framed the period of six years (the period applicable under Act XIV. of 1859) began to run in April 1868, when the properties of the plaintiff and defendant Khatáv Ladhá were sold and applied in satisfaction of the joint decree of the 25th April 1867 in Suit No. 985 of 1866, and not from the date of the decree itself: *Srimati Bimala Debi v. Srimati Tarasundari Debi* (i), and so had not expired when the suit was commenced against any of the defendants.

It was the defendant Khatáv Ladhá who first insisted on the general account being taken. Though the plaintiff in his amended plaint does ask for an account, his primary claim is for contribution without an account, and he only asks for an account if it be found necessary. It is the defendant Khatáv Ladhá who insists on the whole partnership account being gone into, and then when granted, relies on the Limitation Act as a bar to such account. He had, it appears to us, two courses, one or other of which he might have pursued, either to pay his share, whatever it might be, of the excess recovered from the plaintiff on foot of the joint judgment, or to say "I allow the plaintiff has paid more

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than his share on account of the judgment alone, but if the whole account were taken I should not be found liable to pay more in respect of that joint judgment than I have already done." He cannot, we think, be allowed to say "I won't pay any further money by way of contribution to an undoubted payment by the plaintiff on account of the joint decree, because if an account were to be taken it would appear that I ought not to be called on to make any further contribution, but I object to such account, as it is barred by the Limitation Act." The alternative for him, we think, is "either pay your contribution without any account, or, if you say an account ought to be taken in *your* interest, waive your objection on the ground of the Limitation Act, and have the account taken." On the grounds, therefore, that the claim as primarily preferred by the plaintiff appears to be justified by the case of *Sedgwick v. Daniell*, and by the opinions, as cited above, expressed by three of the learned Lords who delivered judgment in *Knor v. Gye*, and as such claim is not barred as against any of the defendants, and that it is the defendant Khatav Ladhá who insists on the partnership account being taken, and the plaintiff being willing that such partnership account should be taken, and without deciding how the case would have stood had the suit been solely or primarily for a general partnership account, we have come to the conclusion that the appeal must be dismissed, and with costs.

[ORIGINAL CIVIL JURISDICTION.]

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March 30.*Suit No. 580 of 1872.*SUGANCHAND SHIVDA'S.....Plaintiff.
MULCHAND JOHA'RIMAL Defendant.*Jurisdiction—Letters Patent, 1865, Clause XII.—Cause of Action—Hundi—
Consideration—Usage of Shroffs.*

The High Courts are not courts of ordinary original civil jurisdiction over the whole of the territories of the presidencies to which they belong, and there is no presumption in favour of jurisdiction beyond what is found expressly conferred by the Charters of constitution.

The decisions of the English Courts on Sections 18 and 19 of the Common Law Procedure Act (15 and 16 Vic., Ch. 76,) relating rather to matter of procedure than of jurisdiction, are not so much in point with regard to the interpretation of Clause XII. of the Letters Patent, 1865, as the decisions on Section 128 of the English County Courts Act (9 and 10 Vic., Ch. 95,) which are directed to the marking out and limiting of the jurisdiction of a court.

Some remarks of Holloway, J., in *DeSouza v. Coles* (3 Mad. H. C. Rep. 413) as to the propositions involved in *Luckmichand v. Zaravwar Mull* (8 Moore I. A. 291) dissented from.

Where a *hundi* had been drawn out of Bombay upon a person in Bombay, indorsed and delivered, out of Bombay, to one who, out of Bombay, indorsed the same and sent it to a person who, in Bombay, received it, got it accepted and presented it for payment to the drawee, by whom, in Bombay, it was dishonoured :

Held that the dishonour of the *hundi* by the drawee in Bombay was a material part of the cause of action by the Bombay holder against the first indorser, and, consequently, that such material part of the cause of action having arisen in Bombay, and the holder having obtained leave to bring his suit under Clause XII. of the Letters Patent, 1865, the Court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable :

Held that, as between the plaintiff and the Ajmir constituent, the plaintiff, upon such credit, in account being given, became a holder for value .

Held also that on the *hundi* being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir

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- Held* also that, as between the Ajmir constituent and the first indorser (the defendant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

THIS case was tried by GREEN, J., sitting alone in a Division Court.

Latham and Farran for the plaintiff.

Pigot and Inverarity for the defendant.

The facts of the case and the authorities cited sufficiently appear from the following judgment delivered by

GREEN, J. :—This is a suit on a *hundi*, dated the 26th April 1871, drawn by Kássidás Vanarásidás at Mandusar on the firm of Bháichand Zumachhrám of Bombay for Rs. 2,500 payable to *Sháh* 45 days after date: The *hundi* which we will refer to as *Hundi A*, bears on it the following enface-ments:—“(This) *hundi* has been sold by Rájrup Hansráj to Bhái Johárimál Gambhirmál (which is the name of the defendant’s firm). It was sent from Kotá by Johárimál Gambhirmál to Bhái Johárimál Gambhirmál at Ajmir in order to (the amount) being recovered on my account. (This) *hundi* has been sold by Johárimál Gambhirmál to Bhái Popsangji Hardardás. (This) *hundi* is sent to Bhái Lachhmandás Shivdás (the name of the plaintiff’s firm) by Popsang Hardarbaksh from Nasirabad, in order to (the amount) being recovered on my account.”

The *hundi*, it appears by the evidence, was received by the plaintiff’s firm in Bombay on the 2nd June 1871, and was presented for acceptance on the following day, namely, the 3rd June 1871, to the drawees, the firm of Bháichand Zumachhrám. It was, on such presentment, accepted, according to usage, by the drawees. On the same day, namely, the 3rd June 1871, according to the evidence of Gambhirschand Ranchhordás (now cashier, then a *Gumastá*, in the plaintiff’s

firm,) an entry was made in the journal of the firm which entry was transferred to the ledger, and as appearing in the ledger, is as follows (Exhibit B). The heading of the account is "An account of Bhái Popsang Hardarbhájas of the cantonment of Nasirabad, being an account relative to transactions effected on behalf of your house," and the entry which is a credit one, is as follows:—"Journal, p. 186. The 11th of Asad Vad [13th June] 1 *hundi* [drawn] on Bombay was [received] from Ajmir payable to your account. It was drawn on Bháichand Zumachhrám on the 6th of Baisuk Sud 26th April [payable after 45 days]." The effect of this was to give credit, as of the 13th June 1871, to the person sending the *hundi*, viz., Popsang Hardarbaksh in his account with the plaintiffs, for the amount of the *hundi*, the entry itself being made on the 3rd June 1871.

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According to the evidence, it is the usage of native *shroffs* that where a *hundi* has been accepted, the drawee, on the due date, sends a man with the money to the person who had presented the bill for acceptance. If the money is not sent on the due date, the holder sends a man to remind the drawee. In the present case, Gambhirchand Ranchhordás (the cashier of the plaintiff's firm) states that as the amount was not received on the due date (viz., the 13th June 1871), he sent a man to demand it, who came back without any money, and he, thereupon, put the matter into the hands of a solicitor. On the next day (the 14th idem) the *hundi* was protested for non-payment by a notary of Bombay, and the notarial certificate, Exhibit C, of such protest has been put in evidence.

According to the evidence of Lálchand Harichand, a *mehtá* of the firm of Bháichand Zumachhrám, the drawees, (speaking from entries in books of the firm made, not by himself, but by another *mehtá*, at present absent from Bombay and at Wadnagar, but which books, the witness was able to state, had been kept in the ordinary course of business), on the 19th June 1871, a *pefh* or duplicate of the

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Under a commission directed to Ajmir in this suit, certain evidence was taken there, and, according to the evidence of the defendant, called by the plaintiffs as one of their witnesses, the original *hundi* or *Hundi A*, was sold by the defendant's agent at Ajmir, one Suratrám, and indorsed at Ajmir to Popsang Hardarbaksh, whose name appears on the *hundi* as an indorsee, and who indorsed the *hundi* to the plaintiffs, the consideration for such indorsement by the defendant's agent of *Hundi A*, being another *hundi* (hereafter referred to as *Hundi B*), dated the 25th May 1871, for Rs. 2,500, drawn by Popsang Hardarbaksh at Ajmir on the plaintiff's firm of Lachhmandás Shivdás at Bombay payable to *Sháh* 51 days after date, that is to say, on the 18th July 1871. Besides *Hundi B*, a certain sum in cash appears to have been paid to the defendant by Popsang Hardarbaksh as the consideration of the indorsement by the defendant of *Hundi A*, and this in respect of interest at 8 annas per cent. on Rs. 2,500, for the period which would elapse between the due date of *Hundi A* (viz., the 13th June), and that of *Hundi B* (viz., the 18th July).

The firm of Popsang Hardarbaksh, however, shortly after the drawing of *Hundi B*, stopped payment (the date of such stoppage being stated to have been on the 3rd June 1871, and the defendant, being apprehensive, as he says, that *Hundi B* would not be honoured on presentation, filed a suit in the court of the Deputy Commissioner at Ajmir, on the 7th June 1871, against Popsang Hardarbaksh, to recover Rs. 2,500 on account of the *Hundi B*. Not, however, content with having filed this suit, the defendant, as he states, four or five days after Popsang Hardarbaksh's failure, procured to be applied for and sent from Mandusar (where *Hundi A* had been drawn) to Bombay a *peth* or duplicate of *Hundi A* and by means of his agents at Bombay, had the same presented to the firm of Bháichand

Zumachhrám, and this *peṭh* was, as before mentioned, paid by the last mentioned firm on the 22nd June 1871.

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The defendant in his evidence admits, so also do his witnesses, that no express condition was made between his firm and Popsang Hardarbaksh, that if the *hundi* of the latter (*Hundi B*) was not honoured, or the firm of Popsang Hardarbaksh failed, he (the defendant) was to realise the *hundi* he sold them (*i.e.*, *Hundi A*).

On the 22nd June 1871, a written statment appears to have been filed on behalf of Popsang Hardarbaksh in answer to the suit of the defendant against him in the Ajmir Court, relying on what would appear to be a good enough ground of defence, that as the due date of the *hundi* sued upon had not arrived, the suit was premature. The defendant states further, that having heard from Bombay of the realisation of the *peṭh*, he applied for leave to withdraw his suit, and the order allowing this, but giving leave to institute a fresh suit, on the plaintiff paying the costs, seems to have been made on the 29th June 1871.

I do not find in the evidence any explanation of the reason why the firm of Bháichand Zumachhrám refused payment on the 14th June 1871 of the original *Hundi A*, as at that time the *peṭh* had not been presented. The practice appears to be for the drawee to pay the original or the *peṭh*, whichever is first presented for payment, and that the drawees had no intention to dishonour the *hundi* altogether, is shown by their having paid the *peṭh* a few days after the original was presented for payment. It may reasonably be presumed therefrom that in the period between 3rd June 1871 (when Popsang Hardarbaksh stopped payment) and the 14th June 1871 (when the original *Hundi A* was refused payment) some communication took place at the instance of the defendant with the drawees, in pursuance of which such refusal took place. Whether the anticipation of the defendant that *Hundi B* would not be honoured by the plaintiffs on presentation was well founded or not, it appears from the defendant's evidence that he never sent it to Bombay for accept-

1875. ance or payment on the plaintiffs as the drawees—at any
 SUGANCHAND rate, it never was presented to the plaintiffs in Bombay, and
 SHIVDA'S this is an important part with regard to the question whether
 v. the consideration for the indorsement to Popsang Hardar-
 MULCHAND baksh of *Hundi A* can be said to have failed.
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A good deal of evidence has been given by several of the witnesses as to the cases in which, according to the usage of *shroffs*, payment of the amount of a *hundi* may be obtained on a *peth* or duplicate. The witnesses all seem to agree in this that when a *hundi* has been lost or stolen, the rightful holder may, according to such usage, obtain from the drawer a *peth* or duplicate, and, on presentation of this to the drawee, has a right to payment of the amount, the original not having already been presented and paid, which, of course, in the case of a *hundi* payable to *Sháh*, may occur. In the present case, however, the defendants, on hearing of the failure of Popsang Hardarbaksh, to whom they had indorsed *Hundi A*, and without any such occurrence as the loss or theft of the *hundi*, procured, as has been mentioned, a *peth*, and, through their agents in Bombay, got the same paid by the drawee, though the original had been already, some days before, presented by the plaintiffs for payment. They set up the case that, according to the usage of *shroffs*, *peths* may also be properly obtained, not only in the cases of loss and theft, but also that when a person to whom a *hundi* has been sold and indorsed has failed, being indebted to the person from whom he had obtained such *hundi*, the latter may obtain a *peth* from the drawer and get payment from the drawee. I do not consider that the evidence clearly establishes such a usage, which would, it appears to me, have a very serious effect in respect to the negotiability of *hundis*. A subsequent *boná fide* indorsee might find, on presentation of the original *hundi*, that, by reason of the insolvency of some preceding indorsee, and of the state of the accounts between such indorsee and his indorser—facts of which he might be wholly ignorant—a *peth* had been obtained and paid by the

drawee. I do not, however, consider it necessary to decide on the existence or validity of such an alleged usage. The evidence seems rather to have been given by way of meeting any observations, which might have been made on the defendant's conduct in procuring the *peṭh* and getting it paid than by way of affording an answer to this suit. Had the suit been against the drawees, the question of the payment of a *peṭh* might have been very material, but I do not see that it is in the present case, which is a suit by holder against former indorser.

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The first issue raised is, whether this Court has jurisdiction to entertain this suit. A suit for the same matter was filed in this Court by the present plaintiffs against the present defendant in 1871 without having obtained the leave of the Court under Clause XII. of the Letters Patent. On the hearing before myself in July 1872, the suit was dismissed for want of jurisdiction. I think the suit was then rightly dismissed. When the present suit was instituted in November 1872, the leave of the Court to institute the suit was first obtained, and the question is not, as in July 1872, whether the cause of action arose, but whether any part of it arose, within the jurisdiction of this Court. It is contended when a *hundī* has been drawn out of Bombay upon a person in Bombay, indorsed and delivered out of Bombay to one who, out of Bombay, indorses the same and sends it to a person who, in Bombay, receives it, gets it accepted, and presents it for payment to the drawee, by whom it is dishonoured, that no part of the cause of action by the Bombay holder against the first indorser has arisen within the jurisdiction.

A certain number of cases were cited in the course of the hearing, being decisions chiefly of English Courts, as to the meaning of the words "cause of action." In three classes of cases, chiefly in England, has the meaning of these words been considered. (1) In cases of applications to change the venue of a transitory action to another county on an affidavit that the plaintiff's cause of action arose in the

1875. county of B, and not in the county of A (where the action was brought), or elsewhere out of the said county of B. SUGANCHAND SHIVDA'S v. MULCHAND JOHA'RIMAL. (2) With reference to the words of the Act establishing County Courts in England (9 and 10 Vic., Ch. 95, Section 128,) giving an election to proceed in the superior courts, where (among other cases) "the cause of action did not arise wholly or in some material point within the jurisdiction of the court where the defendant dwells or carries on his business at the time of the action brought." And (3) with reference to the provision of Sections 18 and 19 of the Common Law Procedure Act, 1852 (15 and 16 Vic., Ch. 76), regulating the mode of proceeding in the superior courts against defendants, whether British subjects or not, residing out of the jurisdiction of such Courts, when a satisfactory affidavit has been made "that there is a cause of action which arose within the jurisdiction or in respect of a contract made within the jurisdiction," and when certain other formal steps have been taken.

Then we have of cases arising in India a certain number reported, where a judicial interpretation or application has been given viz. (1) to the words, in Bengal Regulation II. of 1803, Sections 3 and 4, "where the cause of action shall have arisen," or to the words, in Section 5 of Act VIII. of 1859, "if the cause of action shall have arisen," and (2) to the words, in Clause XII. of the High Court Charters of 1865, "if the cause of action shall have arisen either wholly, or, in case the leave of the court shall have been first obtained, in part within the local limits of the ordinary original civil jurisdiction," &c.

Of the first class of the English cases, of which a great many are to be found, it will be sufficient to remark generally that they all treat a cause of action as something divisible and consisting of parts having possibly a local origin in different places. I shall content myself with referring to three of them: *Clissold v. Clissold* (a), which was an action for libel, and the libel having been written in Berkshire

(a) 1 Term Rep. 647.

and directed into Surrey, and the venue being laid in London, an application to change the venue to Berkshire was refused, because the defendant could not truly make the usual affidavit that the cause of action arose wholly in Berkshire and not elsewhere; *Cailland v. Champion* (b), an action on a policy of life insurance, where it was held that the whole cause of action could not have arisen in London, as the person, whose life was insured, had died in Scotland; and *Butler v. Fox* (c), an action on a policy of marine insurance made in London, the breach alleged being non-payment of the value of the goods insured. An application to change the venue to London was refused, as it could not be truly said that the whole cause of action arose in London, the goods, the subject of the policy, having been lost on a foreign voyage by perils of the sea.

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The second class of English authorities, those, namely, on the jurisdiction of the local county courts, it is not necessary to enumerate, as they are all, or almost all to be found, cited and commented upon in the judgments of Sir Adam Bittleston or of Mr. Justice Holloway in the case of *DeSouza v. Coles* (d). I cannot understand why these cases should not be treated as authorities, so far as applicable, on the interpretation of the language of Clause XII. of the Letters Patent. The High Courts are not courts of ordinary original civil jurisdiction over the whole territories of the presidencies to which they belong. Though, in some respects, their original civil jurisdiction is wider than that of the District Courts, yet it is limited, and there is no presumption in favour of jurisdiction beyond what is to be found expressly conferred by the Charters of constitution. And the County Courts Act and Letters Patent agree in this that they both expressly treat a cause of action as consisting of parts which may have different localities.

The third class of English cases, those, namely, which have reference to Sections 18 and 19 of the Common Law Procedure Act, 1852, are *Sichel v. Borch* (e), *Allhusen v.*

(b) 7 Term Rep. 205. (d) 3 Mad. H. C. Rep. 384.

(c) 18 L. J. (C. P.) 304. (e) 2 Hurl and Colt. 954; S. C. 33. L. J. Exch. 179.

1875. *Malgarejo (f), Jackson v. Spittal (g), Durham v. Spence (h), Cherry v. Thompson (i), and Vaughan v. Weldon (j).* The first mentioned case (which was in the Exchequer) was a suit by indorsee against drawer and indorser of a bill of exchange. The defendant was a merchant residing in Norway, where he drew the bill on an English house, and made it payable in London. He indorsed it in Norway, and sent it by post to a firm in England, who indorsed it to the plaintiff. It was held that the cause of action did not arise within the jurisdiction, on the ground that the contract was not wholly made in England, Martin, B., one of the members of the Court, expressly stating that the cause of action included the drawing and indorsement on the bill of the name of the drawer, both of which took place in Norway. This case of *Sichel v. Borch*, in its circumstances, has great similarity to the present one, viz., a bill drawn or indorsed, out of the jurisdiction, by one not subject personally to it, on a person within the jurisdiction, and there dishonoured. Both in the argument and judgment, it seems to have been assumed that *part* of the cause of action arose within the jurisdiction, the question being considered to be, did the *whole* of it so arise? In the second case (which was in the Queen's Bench) it was held where a contract was made out of the jurisdiction, to be performed within the jurisdiction, that the breach within the jurisdiction did not constitute a cause of action arising within the jurisdiction. In the third case, however (which was in the Common Pleas), it was held, in the case of a contract made out of the jurisdiction not to do a certain thing, which contract was broken by doing that thing within the jurisdiction, that a cause of action did arise within the jurisdiction. In the fourth case (which was in the Exchequer again), it was held (Chief Baron Kelly, however, dissenting) that in the case of a contract made out of the jurisdiction, but broken within the jurisdiction, a cause of action *did* arise within the jurisdiction, thus following *Jackson v. Spittal*. In the

(f) L. R. 3 Q. B. 340.

(h) L. R. 6 Exch. 46.

(g) L. R. 5 C. P. 542.

(i) L. R. 7 Q. B. 573.

(j) L. R. 10 C. P. 47.

fifth case (which was of the Queen's Bench), the case of *Jackson v. Spittal* was dissented from and *Sichel v. Borch* and *Allhusen v. Mulgarajo* expressly adhered to, by holding that in the case of a contract made in Germany, but broken in England, no cause of action arose within the jurisdiction. The decision, however, went also on another ground, viz., that the breach also took place in Germany. It will be seen, therefore, that, so far as concerns the words in question occurring in the Common Law Procedure Act, 1852, there had been a conflict of decision between Courts in England of co-ordinate jurisdiction, and that the law on the point must be said to have been in an uncertain state. A diversity, it is further to be observed, seems to exist among the Judges who took part in the foregoing decisions, not only in respect to the interpretation to be put upon the words of the section taken in conjunction with other words connected with them, but also in the legal definition to be given in general of the phrase "cause of action." The point again arose in the last mentioned case, viz., *Vaughan v. Weldon*, and the Judges of all the three courts appear to have conferred together, and a majority having expressed themselves in favour of following the decision in *Jackson v. Spittal*, the Judges of the Queen's Bench, though retaining their opinion, for the sake of conformity agreed to be bound by the opinion of the majority. Though uniformity of practice on this point was thus secured, the divergence of opinion as to the elements of a cause of action has still remained. It is to be borne in mind also that the provisions of the Common Law Procedure Act, which have given rise to this diversity of decision, concern matters of procedure and not jurisdiction, that is to say, they furnish a less cumbersome and simpler means of exercising a jurisdiction the Courts already had, and are not, as the provisions in the English County Court Act and the Letters Patent of the High Court, directed to the marking out and limiting of the jurisdiction of a Court. For this reason, it seems to me that the English decisions on the County Court Act are more in point with regard to the interpretation of the

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Of the first class of Indian cases, those, namely, relating to the effect to be given to the words "if" or "when the cause of action shall have arisen," the case of *Luckmichund v Zarawurmull* (k) is of course as an authority, and so far as it goes, of the highest importance. Mr. Justice Holloway, in his judgment in *DeSouza v Coles* (l), lays it down that this decision "involves implicitly the following propositions:—(1) The making of the contract is a matter perfectly indifferent, and is no part of the cause of action. (2) The place at which an obligation is to be performed is its seat, and the place of jurisdiction. That place of expected performance may be determined by the circumstances of the case, and in a contract of partnership, its main seat is the place at which each of the partners is bound to pay what may be due." With all respect for the opinion of Mr. Justice Holloway, it does not appear to me that the case, when considered, *does* involve the propositions mentioned, or, at any rate, the first of them. The suit was brought in the Zillah Court at Agra to recover Rs. 10,75,156-1-0, being the alleged share, with interest, of the defendants of the loss, viz., Rs. 22,67,962, incurred in respect of certain opium speculations which had been carried on on the joint account of the plaintiffs and defendants. The plaintiffs had firms at Muthra (within the jurisdiction of the Agra Court) and at Rutlam (which was without it), and the defendants carried on business at Rutlam. An agreement was made between the two firms in contemplation of making opium speculations on joint account, and, in considering the effect of the judgment, it is to be taken as a fact to be assumed that this agreement was concluded, in respect of place, at Rutlam. So far as the terms of the agreement appear in the report, no place can be said to have been fixed for the performance of it. The agreement pro-

(k) 5 Moore Ind. App. 231.

(l) 3 Mad. H. C. Rep. 413.

vides for the opening of a separate set of books for the joint transactions of the parties, fixes their shares, and provides that the business was to be conducted by one Saligram, and the only reference to place is in these words: "In these transactions your (*i.e.* plaintiffs') capital at Muthra shall be embarked." Larger transactions in opium were thereupon entered into in various places, the seat of the partnership being at Muthra, where the moneys were supplied by the plaintiffs, where the partnership books were opened and kept, and to which place the account sales of opium sold elsewhere and the proceeds themselves of such sales were sent. It appears further that at Muthra also the co-partnership dealings and accounts were closed and a balance struck against the co-partnership amounting to the aforesaid sum of Rs. 22,67,962, and it was to recover the sum of Rs. 10,75,156-1-0, being the defendants' share of such loss, that the suit was brought. The Judicial Committee held that the cause of action arose at Muthra. There is certainly nothing in the course of the judgment which can be said to involve this, that in the particular case the original contract of partnership formed any part of the cause of action at all. The decision, however, in my opinion, by no means involves the sweeping proposition stated by Mr. Justice Holloway, "that the making of the contract is a matter perfectly indifferent, and is no part of the cause of action" in any case. The decision may rather, it seems to me, be treated as one involving this, that in such circumstances as there existed, the contract of partnership, on the footing of which transactions were engaged in, was not a part of the cause of action, and that not being a part of the cause of action, the Court considered the place where it was made to be a matter perfectly indifferent. The suit was not one for a breach of any term of the partnership contract, but rather as appears what in English pleading would be called an action on an account stated, the statement of such account having taken place within the jurisdiction of the court where the suit was brought. The only other form

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the suit can have assumed would be for a partnership account, and where else could the cause of such action be said to arise, except where, by consent of the parties, the head-quarters of the partnership had been established, the moneys advanced, the accounts kept, and the final accounts of the partnership dealings closed? The language of the judgment is, to say the least, consistent with the existence of the opinion, on the part of the Judicial Committee, that the making of the contract not being a part of the cause of action, the fact that it was made out of the jurisdiction, was immaterial, and did not preclude the court from entertaining the suit, which was either on an account stated within the jurisdiction in respect of partnership transactions, the head-quarters of which were within the jurisdiction, or for an account of such partnership transactions.

The cases in which, in the courts of British India, the question as to the meaning of the words "cause of action" in the Letters Patent has arisen, are, besides *DeSouza v. Coles*, the following: *Harjivandas v. Bhagvandas* (m) and *Mothoormohun Roy v. Jadoomoney Dossee* (n).

In these two cases, the leave of the court had not been previously obtained to the institution of the suit, but I think, from what appears in the reports, that both Mr. Justice Phear and Mr. Justice McPherson would have held, in a case like the present, that a part of the cause of action had arisen in Bombay, and that if leave had been first obtained to institute the suit, the court would have had jurisdiction. In the case of *Huth v. Long* (o), however, in an action on a bill of exchange by the indorsee against drawer, the fact that notice of dishonour was given to the defendant within the jurisdiction of a particular County Court, where also the defendant resided, was held sufficient, under the County Court Act, to deprive the plaintiff of his costs, the

(m) 7 Beng. L. R. 102 and on appeal 535.

(n) 10 Beng. L. R. 122.

(o) 19 L. J. Q. B. 325.

suit having been brought in a superior court. The decision involved this, that notice of dishonour was a part, and a material part, of the cause of action against the drawer of a dishonoured bill of exchange, and that such notice having been given within the jurisdiction of a certain County Court, where the defendant resided, the cause of action in some material point arose within such jurisdiction. In the present case the dishonour of the bill itself by the drawee took place in Bombay, and was, I think, beyond all doubt, a part, and a material part, of the cause of action against a prior indorser, and this being so, and the leave of the court to institute the suit having been obtained, I am of opinion that this court has jurisdiction to entertain this suit.

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With regard to the other questions in the case, it appears from the evidence that the plaintiffs (who are a considerable firm of shroffs and bankers in Bombay and other places) had, for some time, acted as bankers and agents of a firm of Popsang Hardarbaksh who carried on business at Ajmir and elsewhere, but not in Bombay. The course of the ordinary business was that the firm of Popsang Hardarbaksh, if they had *hundis* drawn on Bombay, used to send them down to the plaintiffs for collection, and used themselves to draw *hundis* on the plaintiffs' firm in Bombay against any funds of theirs in the plaintiffs' hands, or, if there were no such funds, the plaintiffs used to honour such *hundis* on the credit of their correspondent. In the present case it appears that, on receipt by the plaintiffs of *Hundi A*, and on its acceptance by the drawees, the plaintiffs gave credit to Popsang in his account with the plaintiffs' firm for the amount as of the date when the *hundi* would become payable, the drawees being at the same time debited. At the time when such credit was given and after allowing such credit, the balance against Popsang in account with the plaintiffs was Rs. 13,221-8-0. That such credit in account is a consideration in the case of an indorsee of a bill of exchange is illustrated by the case of *Percival v. Frampton (p)*, and the plaintiffs, though agents

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of Popsang in receiving the *hundi* for collection, became, upon such credit being given, holders for value. The evidence of the practice followed by *shroffs* when a *hundi* has been sent down to Bombay for collection and when payment is refused, the amount having been already credited to the sender, is that in general the *hundi* is returned to the sender, a debit entry against him being at the same time made. In the present case, however, on the refusal by the drawee to pay the *hundi*, no debit entry was made to the sender Popsang, but the amount remained credited to him, the cashier of the plaintiffs' firm in Bombay stating, as the reason for not so debiting the sender, that they wished to sue the defendant. The plaintiffs' conduct in treating Popsang as entitled to credit for this *hundi*, though dishonoured by the drawee, has been consistent, as it appears, from the evidence taken at Ajmir, that in the suit filed some months after at Ajmir by the plaintiffs against Popsang to recover the balance due to them, they still allowed credit for the amount of this *hundi*. Having regard to the evidence of usage, I am of opinion that the plaintiffs were entitled to take the course they did in treating Popsang as still entitled to credit for the *hundi*, though dishonoured by the drawees, and in treating themselves as holders of the same for value. With regard to the question of consideration given by Popsang to defendants for *Hundi* A, the *Hundi* B was of course in itself a consideration besides the payment of a sum in cash for the difference in interest. The *Hundi* B was, as has been seen, never presented in Bombay for acceptance or payment, and was, therefore, never dishonoured. How, then, can it be said that there has been any failure of consideration for the indorsement to Popsang of *Hundi* A? There is no ground for any certain conclusion or presumption that *Hundi* B, if at once presented (as it might have been) for acceptance by the plaintiffs before Popsang's failure was known in Bombay, would not have been accepted by the plaintiffs, and as the defendant had given consideration for it, he might have sued the plaintiffs upon it, if accepted by them,

and recovered the amount. I am of opinion, therefore, that there was consideration for *Hundi A* both as between Popsang and the defendant and as between Popsang and the plaintiffs, and that of the former consideration no failure has been shown. On the 2nd, 3rd, and 4th issues, therefore, the finding is that, besides the *hundi* in para. 3 of the written statement mentioned, there was payment of a sum of cash, the amount of which does not appear, in respect of interest on Rs. 2,500 for the period between the due dates of that *hundi* and the *hundi* sued upon in this suit. That further the plaintiffs received the *hundi* sued upon as agents of Popsang Hardarbaksh, but that before and at the time of the same becoming payable, and at the time of the institution of this suit, they became and were holders of the same for value, and so far did not hold the same as agents only of the said Popsang. This being so, the finding on the 5th issue is that the plaintiffs are entitled to recover the moneys claimed in the plaint. Decree for the plaintiffs for Rs. 2,500, with simple interest at 9 per cent per annum from the 15th June 1871 till this day, and Rs. 10 for notarial charges; costs. Interest on decree at 6 per cent.

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NOTE.—This decree was subsequently, on October 15th, 1875, affirmed with costs by the Appellate Court, WESTROPP, C.J., and SARGENT, J., see I, I. L. R. (Bombay), 23.—*Ed.*

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 47 of 1871.

April 2 and 3.

HIRJI JINA' *Plaintiff.*
NA'RRAN MULJI and another *Defendants.*

Practice—Appeal from order—Decree—Civil Procedure Code, Section 363.

The question whether or not an order is appealable is one for the decision of the Court.

An order passed in a suit, referring it to the Commissioner to take the accounts between the parties, is a decree.

An order, passed on a certificate given (under Rule 371 of the Equity Rules of the Supreme Court) by the Commissioner, subsequently to the order of reference, is appealable.

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Sonábhai v. Ahmedbhai (9 Bom. H. C. Rep. 398) explained. *The Justices of Peace of Calcutta v. The Oriental Gas Company* (8 Beng. L.R. 433) distinguished.

THE plaintiff, desiring to appeal from an order of Bayley, J., made on the 19th December 1874, by which a decision of C. E. Fox, Commissioner for taking accounts, was reversed, lodged a memorandum of appeal with the Prothonotary, who, however, refused to file the appeal, on the ground that the order was interlocutory, and therefore not appealable (a).

Inverarity, for the plaintiff, on the 2nd April 1875 brought the facts stated above to the notice of the Appellate Court, WESTROPP, C.J., and SARGENT, J.

PER CURIAM :—We are of opinion that we ought not to delegate to the Officer of this Court the decision of a question properly cognisable by the Court itself, viz., whether or not an appeal lies. When a party, desirous of appealing from an order, lodges his memorandum of appeal within the proper time, the right course is for the Prothonotary to file the appeal, and to bring to the notice of the Court the fact that it is doubtful whether the order is appealable. Of course, if the memorandum is not lodged within the proper time, the Prothonotary is right in refusing to file the appeal, and the intending appellant must then apply to the Court by special motion.

On the following day, April 3rd, 1875, the case again came on for argument on the preliminary question, whether or not an appeal lay from the order of Bayley, J., made on 19th December 1874, on the certificate of C. E. Fox, Commissioner, dated 2nd October 1874.

The plaint was filed on 24th January 1871, and sought to recover from the defendant the amount alleged by the plaintiff to be due to him on the common money counts, and on an account adjusted on the 18th October 1868. The defendant, in his written statement, pleaded : 1st, that the Court had no jurisdiction to hear and determine the suit ; 2nd, that the account was not adjusted as in the plaint

(a) *Sonábhai v. Ahmedbhai*, 9 Bom. H. C. Rep. 398, see pp. 405 et seq.

alleged; and 3rd, that the plaintiff's claim was time-barred.

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The case came on for hearing before Bayley, J., on the 20th December 1873, when the learned Judge held that no adjustment, either in October 1868 or afterwards, had been proved, and that as to certain items included in the plaintiff's claim the Court had no jurisdiction, inasmuch as the whole cause of action with regard to those items had not arisen within the jurisdiction, and the plaintiff had not obtained leave to sue in respect of them under clause 12 of the Letters Patent. On the question of limitation, the learned Judge held that the plaintiff was entitled to an account extending over the six years immediately preceding the date of the filing of the plaint, and referred it to C. E. Fox, Commissioner for taking accounts, and as such a permanent officer of the Court, not specially appointed under Section 181 of the Civil Procedure Code in this cause, to take such account, directing him to allow the defendant credit for two items, admitted by the plaintiff in his particulars of claim to have been received by him within the six years immediately preceding the 24th January 1871, but not within the jurisdiction of the Court, "as well as for such other sums as the defendant might prove himself to be entitled to credit, wherever the same should become payable." The plaintiff filed his account before the Commissioner on the 1st April 1874, giving credit to the defendant for the two items as directed by the order of reference, and to this account the defendant filed a surcharge on the 23rd June 1874, by which he claimed credit for various payments made by him to the plaintiff. Before the Commissioner the plaintiff admitted having received the payments mentioned in the surcharge, but contended that the defendant was not entitled to credit for them in the present account, inasmuch as they had been appropriated towards the payment of sums due from the defendant prior to the 24th January 1865, and not included in the account directed by the order of reference. It was not pretended by the defendant that at the time of making the payments he had appropriated them to the discharge of any particular debt, but he contended that, having regard to the

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The question now for the decision of the Appellate Court was, whether an appeal lay from this order of 19th December 1874.

Inverarity for the plaintiff, appellant :—By the practice of this Court an appeal lies from the order of reference. *Dayál Juiráj v. Khatáv Ladhá* (b) was an appeal from such an order. Whether this order of 19th December 1874 is appealable, depends on whether the order of reference of 20th December 1873 is appealable. If that order is held to be interlocutory, *Sonábhái v. Ahmedbhái* (c) is against me. The question, therefore, is, whether the order of reference of 20th December 1873 is a "decree" within the meaning of Section 363 of the Civil Procedure Code. If it is, the order of 19th December 1874, which is supplemental to it, is also a decree, or, if it is not a decree, is still appealable as being made after the order of 20th December 1873, which is a decree. In the *Justices of Peace of Calcutta v. The Oriental Gas Company* (d), a wider construction was put on the word "judgment" in clause 15 of the Letters Patent than was done in *Sonábhái v. Ahmedbhái*. *DeSouza v. Coles* (e) gives a still wider

(b) *Supra*, p. 97.

(c) 9 Bom. H. C. Rep. 398.

(d) 8 Beg. L. R. 433.

(e) 3 Mac. H. C. Rep. 384.

construction to the word "judgment" than either the Bombay or the Calcutta case. If the Judge in the court below had held that the plaintiff was not entitled to an account, such an order would have been appealable. The order directing the account to be taken must, therefore, also be appealable. If, however, the order of reference is not appealable, then this order of 19th December 1874 is not. In that case we could, under Section 363 of the Civil Procedure Code, appeal against both those orders after final decree, and what would be the result? If the order of 20th December 1873 were wrong, all proceedings held and accounts taken under it would be upset, and all the time and money spent in the proceedings before the Commissioner would be wasted. [He was here stopped by the Court.]

[WESTROPP, C.J. :—The separate certificate of the Commissioner, and the rule and practice of this Court, under which that certificate was given, are entirely outside but not opposed to the provisions of the Civil Procedure Code. Of that rule, and of that practice, the defendant has availed himself, by getting the certificate which the Commissioner is authorised to give for the purpose of preventing protracted litigation. How then can the defendant, after this, be allowed to rely solely upon the Civil Procedure Code?]

Scoble, Advocate-General, for the defendant, respondent :—A *mandamus* is a proceeding *dehors* the Civil Procedure Code, yet, on the authority of the *Justices of Peace of Calcutta v. The Oriental Gas Company*, the order for a *mandamus* is not appealable. If by the order of 19th December 1874 the Judge in the court below misinterpreted his own former order of 20th December 1873, the plaintiff ought to have waited until the passing of the final decree on the Commissioner's report, and then have appealed against that decree. The order of 19th December 1874, which is now sought to be appealed against, does not finally affect the rights of the parties, and the question whether such an order is appealable must be decided independently of the fact whether or not the plaintiff gets anything by the final decree. That

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this order was in a matter not contemplated by the Civil Procedure Code does not affect the question, for *Sonábhái v. Ahmedbhái* decides that interlocutory orders are not appealable; this order is interlocutory, being simply a direction to the Commissioner to take the account in a particular way, and it is clearly "prior to decree" within the meaning of Section 363 of the Civil Procedure Code, because the Code contemplates no other decree than the final decree. The practice adopted by the defendant, no doubt, was that reserved by the rules of the Court, but, however that may be, this case must be governed by the decisions of the Courts of Bombay and Calcutta in the two cases already cited. The order now sought to be appealed against is not decretal in its nature, even assuming the order of reference to be so. If the order of reference is not a decree, then this order, being "prior to decree," is not appealable under Section 363 of the Civil Procedure Code. If the order of reference be a decree, then, with regard to the order now sought to be appealed against, the plaintiff ought to have proceeded under Act XXIII. of 1861, for it would be an "order in execution of a decree." But the order of reference itself was not decretal, for no account was prayed either in the plaint or written statement. The new Rule No. 1, at p. 38 of the Rules of this Court (f), shows how far the old Equity

(f) "All rules which at the time of the abolition of the Supreme Court of Judicature at Bombay were in force for regulating the practice of the Court at its Plea and Equity Sides, shall extend, so far as the same are applicable, and as nearly as may be, to all matters of Ordinary Original Civil Jurisdiction in this Court, except in such respects as the same may be contrary to the Stat. 24 and 25 Vic., Chap. CIV., or to the Letters Patent continuing this Court, bearing date the 28th day of December in the 29th year of the reign of Her Majesty (A.D. 1865), or to the Rules of this Court made, or which shall hereafter be made, under and in conformity with the 37th Section of the said Letters Patent, or to the provisions of Act VIII. of 1859, and of any subsequent law which has been made, amending or altering the same by competent legislative authority for India, save so far as the said provisions of the said Act VIII. of 1859, and subsequent laws as aforesaid, have been, or hereafter shall be, as regards this Court, duly modified by its Rules which have been, or hereafter shall be, made, as aforesaid, under and in conformity with the 37th Section of the said Letters Patent. And the practice of this Court in all matters of Ordinary Original Civil Jurisdiction aforesaid; shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859, and of any subsequent law which has been made amending or altering the same by competent legislative authority for India, except so far as such provisions are, or hereafter shall be, modified by this Court, under and in conformity with the said 37th Section of the Letters Patent granted by Her said Majesty in pursuance of the said Stat. 24 and 25 Vic., Chap. CIV.,

Rules followed by the late Supreme Court are to be applied in this Court. The old Equity practice of allowing appeals from interlocutory orders is contrary to the Letters Patent and contrary to the Civil Procedure Code. [He cited *Petition of Court of Wards (g)*.] The order sought to be appealed against is not final, nor even decretal, but is simply a direction to the Commissioner to take the account in the way already ordered by the order of reference, which he had misinterpreted. But what the plaintiff is seeking to do by appealing against this order is to appeal against the order of reference after allowing the time for so doing to elapse. If this order is appealable, then whenever an order is passed, during the pendency of proceedings, to parties to whom liberty to apply is reserved, it would be open to the other side to say that such orders are decrees, and to claim to be allowed to appeal from them, whereby litigation would be indefinitely protracted and great inconvenience occasioned.

Inverarity, in reply :—Such inconvenience does not seem to be experienced in England, where appeals are allowed from orders made on applications to vary or discharge the chief clerk's certificate: Daniell's Chancery Practico, 1226. Moreover, in this country the Letters Patent of 1865, Clause 40, clearly contemplate the admissibility of appeals on interlocutory matters.

WESTROPP, C.J. :—The Commissioner decided that the principle on which the account was to be taken was that the plaintiff should bear liberty to show that the defendants' payments had been made in respect of matters other than those included in the account ordered to be taken by the order of 20th December 1873. This decision materially affects the merits of the case, and of course the reversal of that decision would also do so to an equal degree. With this

and the Stat. 28 and 29 Vic., Chap. XV. Nothing hereinbefore contained shall affect Chap. XVIII. of the Rules of this Court, made on the 25th day of November 1867, regulating the proceedings in its Admiralty and Vice-Admiralty Jurisdiction, or the Procedure of this Court in its Testamentary and Intestate Jurisdiction, which as heretofore shall continue to be the same as that of the said Supreme Court in its like jurisdiction at the time of its abolition.

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1875. important question affecting the case, the defendants' attorney obtained the certificate from the Commissioner. The practice, by which the Commissioner is entitled to give such a certificate, was an old and most useful practice in the Master's office, resting on the Equity Rule No. 371 (h) of the late Supreme Court. The object of that rule was to enable parties to bring important questions before the Court as early as possible. It was for the curtailment of expense and avoidance of protracted litigation. By the practice of this Court, exceptions are argued to separate certificates of the Commissioner, just as in the late Supreme Court on the Equity Side to certificates of the Master, and the orders made on such exceptions are equivalent to decrees. The old Equity Rules have to a certain extent been applied in this Court to suits under the Civil Procedure Code, and are recognised in the new rule of this Court made in 1872, to be found at p. 38 of the Rules of the High Court. The Civil Procedure Code must here be considered in conjunction with the rules and practice of this Court. According to those rules and practice, this Court may split its decree, and there can be in a suit as many decrees as there are separate certificates of the Master on which the Court has passed orders. Experience has long since shown that separate certificates will not be granted on such light grounds, or so frequently in the course of a cause, as to produce the inconvenience and delay suggested in the argument for the defendant. Rule 371 has worked quite in the opposite direction, and been most conducive to the prevention of the waste of both time and money. That rule clearly contemplated that orders of decretal character should be obtained between the decree of reference and the final decree on the Master's report. The order now sought to be appealed against would be a decretal order made on the certificate of the Commissioner, for if that order be not decretal matter, it is impossible to say what is. The order also most materially affects the plaintiff's rights. There

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(h) "In all matters referred to him, the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court."

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is nothing in Section 363 of the Civil Procedure Code excluding such an order, for it is a decree *pro tanto*. It cannot be said to be "prior to a decree," for there has already been a decree to take the account, and, moreover, the order is itself a decree. The two cases relied on by the defendant are not applicable in the present instance, for neither of the orders from which an appeal was sought in those cases was decretal in its nature. In *The Justices of the Peace of Calcutta v. The Oriental Gas Company*, the Calcutta High Court held that it was by its own rule limited to consider the *mandamus* as a proceeding under the Civil Procedure Code. In *Sonábhai v. Ahmedbhai*, the order sought to be appealed against was one made in chambers for the production of books—a mere matter of procedure, not a question as to the rights of the parties. On the other hand, there is a case, reported at 2 Ind. Jur. 205, in which there was a partial decree, just as there is in this case, and it was held to be appealable. We have been referred to Act XXIII. of 1861. The only section of that Act which seems at all capable of application to the present case is Section 38, which provides that in all "miscellaneous proceedings" the procedure prescribed by the Civil Procedure Code shall be followed *as far as it can be*. I do not consider that the proceedings with regard to the Commissioner's certificate were "miscellaneous" within the meaning of that section. They were proceedings in the regular course of the suit, viz., in that stage of it when it was in the Commissioner's office for the purpose of having the account taken. We are of opinion that it would be highly disadvantageous to suitors if an appeal did not lie in such a case as the present, the appeal must, therefore, be allowed, and will come on for argument on the merits in due course. Costs of the preliminary point argued before us to-day are reserved until the disposal of the appeal.

SARGENT, J. :—I agree that this order is appealable, and should not have thought it necessary to add anything to the remarks of the Chief Justice, had it not been for the argument which the learned Advocate-General based on my

1875. judgment in the case of *Sonábháí v. Ahmedbhái*. At page 408
 HIRJI JINA' I am reported as saying that "the effect of the rules made
 v. under the 2nd letters Patent is that the Code of Procedure is
 NA'RRAN again incorporated in the letters Patent." It is clear from
 MULJI the context that the words "so far as the same is applicable"
 have been inadvertently omitted. Having then regard to the
 long-established practice of this Court, if Section 363 of the
 Civil Procedure Code is to be applied, the word "decree" must
 be held to include the decree of reference, in which case the
 order of 19th December 1874, which is now sought to be ap-
 pealed against, having been made after the decree of reference,
 is not one "prior to decree," and being one which decidedly
 affects the merits of the case is, therefore, appealable.

[APPELLATE CIVIL JURISDICTION.]

April 5.

Special Appeal No. 111 of 1874.

MAHA'BALAYA' BIN PAR- } *Plaintiffs and Appellants.*
 MA'YA' and another.

TIMAYA' BIN APPAYA' } *Defendants and Respondents.*
 and two others.

Undivided Hindu family—Ancestral property—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession.

The purchaser at a court's sale of the right, title, and interest of one of the co-parceners in the undivided estate, by his certificate, under Section 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of, as a member of the united family.

Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property, forming only a part of the common estate.

Where, however, the purchaser got into possession and held it with such an accompanying right as the judgment-debtor could transfer to him:

Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a

definition of the portions in which each party, in future, was to have a sole interest. Such co-parceners, however, are not entitled to eject the purchaser wholly from a defined moiety of any particular portion of the joint property.

1875.

MAHA'BALA-
YA' BIN
PARMA'YA'
v.
TIMAYA' BIN
APPAYA'.

THIS was a special appeal from the decision of A. L. Spens, District Judge of Kanara, affirming the decree of A. M. Canten, First Class Subordinate Judge of Sirsi.

Mahábalayá and his brother Rámayá brought this suit to set aside the sale of certain land and other immoveable property, made in execution of a decree obtained by Timmá bin Ganpayá (defendant No. 3) against Timayá bin Apayá (defendant No. 1), and to recover possession of a moiety of the said property from the execution-purchaser, Sangan Ganpayá (defendant No. 2). The plaintiff stated that the father of Timayá (defendant No. 1) and his own father Parmayá were full brothers; that the property in dispute was the joint property of the whole family; that Sangan (defendant No. 2), as purchaser of the right, title, and interest of Timayá (defendant No. 1), could only claim the share of the judgment-debtor, and that the debt was not contracted for any common family necessity or benefit. Timayá did not appear. The second and third defendants answered that the debt for which the property in dispute was sold in satisfaction of a decree against Timayá was contracted by him as manager, and for the common use and benefit of the joint family, and that, therefore, the sale was binding on the plaintiffs. Both the lower courts held the debt to have been contracted for the benefit of the joint family, and threw out the plaintiff's claim.

The special appeal was argued before WEST and PINHEY, JJ.

Dhivajlál Mathurádás (Government Pleader) for the special appellants.

Ganpatráv Bháskar and *Shámráv Vithal* for the special respondents.

WEST, J.:—We are of opinion that the third defendant in this case by a certificate, under Section 259, Civil Procedure Code, conveying to him the right, title, and interest of

1875. Timayá, could take no more than the interest of Timayá in the property, thus disposed of, as a member of a united family. What that interest was, and how the transaction could be made good, if at all, for the benefit of the purchaser of a co-parcener's interest in a particular piece of land, forming but a part of the common property, would have to be disposed of, if he were seeking possession, according to the principles laid down in the case of *Pándurang v. Bháskar* (a). In the present case, however, the purchaser has got into possession, which he now holds with such an accompanying right as the judgment-debtor, Timayá, could have transferred to him. He is in, therefore, as a tenant in common with Timayá's co-parceners, the plaintiffs. They are entitled to possession in common with the purchaser, and if this is refused, they may enforce their right by a suit for a share of the enjoyment or for a definition *in specie* of the portions in which each party is to have for the future a sole interest; but they are not entitled to eject the purchaser wholly from a defined moiety of the land. It may turn out on inquiry that, on an equitable adjustment of the several rights of the members of the joint family and on a marshalling of the elements of its estate, so as to give effect, so far as may be, to the execution sale of land as included in Timayá's share, the whole of the land in dispute or more than a moiety of it may be left in the hands of the defendants. In the meantime, we cannot say that the plaintiffs are entitled to separate exclusive possession of any particular portion. The District Judge has rejected their claim altogether. This order we modify so as to declare the plaintiffs entitled to possession along with the defendants as tenants in common, but no more. Each party to bear his own costs throughout.

(a) 11 Bom. H. C. Rep. 72.

[APPELLATE CIVIL JURISDICTION.]

1875.
April 5.*Special Appeal No. 288 of 1874.*NILAVA' KOM RACHAPPA' *Plaintiff and Appellant.*RUDRAYA' BIN RACHAP-
PA' and another. } *Defendants and Respondents.**Registration Act XX. of 1866, Section 17—Agreement relating to a family arrangement.*

Where a document was in the nature of a family arrangement, and drawn up mainly for the purpose of settling a widow's maintenance, though some right in immoveable property was created or declared by such instrument, and it was proved that the actual value of the whole of the immoveable property mentioned in the document exceeded Rs. 100, but there was no evidence to show that the value of the widow's right exceeded that sum :

Held that for the purpose of registration under Act XX. of 1866, the actual value of the whole immoveable property named in the document must not be taken to be the value of the right so created or declared.

THIS was a special appeal from the decision of S. Tagore, Assistant Judge of Belgaum in charge of Kaládgi, reversing the decree of the Subordinate Judge of Bágalkot.

Nilavá sued to obtain possession of a field and arrears of maintenance, according to the terms of two agreements (Nos. 3 and 4), executed to her respectively by her adopted son, Rudraya, and his natural father Gurubasayá. She chiefly relied upon Exhibit No. 3. The defendants denied the execution of the two documents, and objected to their being admitted in evidence, under Section 49 of Act XX. of 1866, as they were not registered as required by Section 17 of that Act. The following is an English translation of Exhibit No. 3 :—

“To

Nilavá kom Rachappá.

“I, Rudrayá bin Rachappá, * * * hereby execute this agreement to you, my adoptive mother. The following arrangements are made for your maintenance.

“I will supply you every year with three gonis jawari of 10 maunds (16 seers per maund) old measure for your subsistence.

1875.

NILAVA' KOM
RACHAPPA'
v.
RUDRAYA'
BIN
RACHAPPA'.

" You should dwell in the house in which you are now living for the term of your life. I will not deprive you of the house. If we both like to live together, we shall do so, or else you may occupy it alone as long as you live.

" I have made over to you another house which stands to the south of the above house for the expenses of clothing, &c.

" The following ornaments are made over to you for wearing. * * * *

" I will pay every year 4 rupees for holiday expenses.

" Thus the arrangements are made. I will make over to you the field of my adoptive father, Rachappá, which is situated at Mudapur, for your maintenance. If I fail to act up as above, I shall have no claim to it during your life time.

" Dated 14th July 1870."

The court of first instance held that exhibits 3 and 4 did not require to be registered, and, finding them proved, decreed the plaintiff's claim. In appeal, the question of registration was again raised with regard to Exhibit No. 3, and the Assistant Judge, deciding it affirmatively, threw out the plaintiff's claim in reversal of the first court's decree. He, however, held both the agreements (Nos. 3 and 4) proved, and expressed his opinion that the plaintiff's claim was correct and in accordance with the terms of Exhibit No. 3.

The special appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA'S, JJ.

Dhirajlál Mathurádás (Government Pleader) for the appellant :—Exhibit No. 3 is an agreement within the meaning of Act. XX. of 1866, Section 18, Clause 7, and requires no registration. [NA'NA'BHA'I HARIDA'S, J., referred to *Wásudev Moreshvar v. Rámá*] (a).

Ghanashám Nilkant Nádkarni, contra, cited *Bhyrub Chunder Dass v. Kalee Chunder Chuckerbutty* (b) and *Nilmadhab Sing v. Fatteh Chand* (c).

(a) 11 Bom. H. C. Rep. 149.

(b) 16 Calc. W. R. 56. Civ. Rul.

(c) 3 Beng. L. R., 310.

KEMBALL, J. :—This is a suit brought by a widow against her adopted son and the natural father of that adopted son to obtain possession of a field of her late husband's, which the father of the adopted son had received possession of from her, promising, in consideration of such possession, either to provide her with maintenance, or, in default of such provision, to restore the field to her. She also claimed arrears of maintenance, and her suit was based on two documents, exhibits 3 and 4, one passed by the adopted son, defendant No. 1, and the other by his father, defendant No. 2. These two defendants denied every important allegation in the plaint, imputed adultery to the plaintiff, and contended that, as the documents above-mentioned had not been registered, they were inadmissible in evidence. The Subordinate Judge found that the documents did not require registration, and that the plaintiff completely established her case. In Regular Appeal, the Assistant Judge held that document No. 3 required registration, and threw out the claim on that ground, though he went on to find that the plaintiff had, if document No. 3 were admissible, a good claim against both the defendants. The question we have to determine is whether the Assistant Judge was right in rejecting document No. 3. He has grounded his decision on this point on the fact that the aggregate value of the two houses and the land comprised therein was shown by evidence to exceed Rs. 100, but we do not think that this is the proper way to test the necessity for registration. The document in question was in the nature of a memorandum of a family arrangement, and was drawn up mainly, as was No. 4, for the purpose of settling the widow's maintenance; and although it must be admitted that some right in immoveable property was created or declared by those instruments, it would be going too far to say that the actual value of the whole immoveable property named must be taken to be the value of the right so created or declared. There is no evidence to show that the value of the right to the immoveable property comprised in document, Exhibit 3, exceeded Rs. 100. We must, therefore, hold with the Subordinate Judge that it was ad-

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BIN
RACHAPPA'.

1875. missible in evidence, although not registered. We come to the conclusion with the less hesitation as we feel satisfied of the justice of the plaintiff's claim. We, therefore, reverse the Assistant Judge's decree, and restore that of the Subordinate Judge with costs on the respondents.

NILAVA' KOM
RACHAPPA'
v.
RUDRAYA'
BIN
RACHAPPA',

[APPELLATE CIVIL JURISDICTION.]

April 8.

Special Appeal No. 81 of 1874.

TRIMBAK RA'NU Plaintiff and Appellant
NA'NA' BHAVA'NI and } Defendants and Respondents.
another. }

Regulation XVII. of 1827, Section 7, Clauses 1 and 2—Bombay Act I. of 1865—Right of occupation—Miras land—Burden of proof.

On the 28th August 1857, the plaintiff passed a *kabukiyat* to Government, and took possession of certain *Mirás* land, abandoned by the *Mirásdár* for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In an action brought by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them. Both the lower courts rejected the claim. The Lower Appellate Court based its decision on the ground that as the plaintiff failed to prove the fact of his alleged partnership with the defendants he could not succeed, notwithstanding that court found in the plaintiff's favour the other facts stated above :

Held in special appeal that as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Regulation XVII. of 1827, Section 7, clauses, 1 and 2, and Bombay Act I. of 1865, have called upon the defendants to prove their claim to hold possession as against the plaintiff's right of occupation.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmednagar, affirming the decree of Purushotam Shidheshwar Binivale, First Class Subordinate Judge at the same place.

Trimbak brought this suit to recover possession of a field (survey No. 59), and alleged that the field belonged to him ; that about five years before the date of the suit he took the defendants into partnership with him and cultivated the field ; that afterwards, when he proceeded to cultivate it alone, the defendants obstructed him in doing so, and dispossessed him of the land. The defence chiefly was that the field in dispute was the *mirás* land of one Khandu Go-

vindá, from whom the defendant Náná Bhaváni took it for cultivation for a term of nine years, on payment of the Government assessment. The defendants denied the partnership alleged by the plaintiff. The first court rejected the claim on the ground that the defendants did not get the field from the plaintiff. In appeal, the Judge affirmed that decision, on the ground that the plaintiff's evidence failed to prove his case, because he did not prove the alleged partnership. The following extract from his judgment will show his reasons :—

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TRIMBAK
RA'NU
v.
NÁ'NÁ'
BHAVA'NI.

“ The evidence shows that this land was the *mirás* of Khandu valad Govindá. Khandu (No. 47) admits that the land was waste five or seven years, and that the plaintiff then took it from Government. The plaintiff took it from the Government by a *kabuláyat* (No. 28), dated the 28th August 1857. The plaintiff's receipt book (No. 29) shows that he paid the assessment on the field from 1864 till 1872. The plaintiff's witnesses say that they saw the plaintiff alone cultivating the field for ten or fifteen years, and that afterwards the plaintiff and the defendant Náná cultivated it together ; but their evidence does not clearly show whether the plaintiff and the defendant Náná jointly cultivated the whole field, or whether they each cultivated half. It is remarkable that the plaintiff says in his plaint that he took the defendants into partnership four or five years ago. The plaint ought to have been returned to him to specify the exact time. There is no direct evidence to prove the alleged partnership, and I cannot infer it from the circumstances above mentioned. * * * * The plaintiff's evidence fails to prove his case. It is, therefore, needless to review the evidence for the defence.”

The objections urged in special appeal on behalf of the plaintiff were these :—(I.) The lower court was wrong in holding that the appellant had not shown a better title, although he proved abandonment of the field by the *Mirás-dár* and his occupation under Government. (II.) The suit was brought on the ground that the appellant was illegally

1875. dispossessed, and not on the ground of partnership. The lower court, therefore, ought not to have gone into the question of partnership, but ought to have determined the appellant's title.

TRIMBAK
RA'NU
v.
NA'NA'
BHAYANI.

The appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA's, JJ.

Bhairavnáth Mangesh, for the appellant, referred to Regulation XVII. of 1827, Section 7, Clauses 1 and 2, and Bombay Act I. of 1865, and contended that the facts found by the District Court sufficiently proved the plaintiff's right to occupation, and that the burden lay on the defendants to show their title to possession as against that right.

Shámráv Vithal for the respondents.

KEMBALL, J. :—It appears to us that the District Judge has proceeded on a wrong ground in rejecting the plaintiff's claim by reason of his having failed to prove that he had taken the defendants into partnership. The Judge has found in distinct terms that the land was the *mirás* land of one Khandu, that this Khandu had neglected to cultivate it for six or seven years prior to the 28th August 1857, when the plaintiff passed a *kabuláyat* to Government and took possession of the land, and that the plaintiff had, at least from 1864 to 1872, paid assessment to Government (Khandu himself saying that the plaintiff had been in occupation from 1857 up to the present time), but he went on to hold that, because the plaintiff had alleged he let the defendants in as partners four or five years ago, and failed to prove that fact, therefore he could not succeed, remarking : "The plaintiff's evidence fails to prove his case. It is, therefore, needless to review the evidence for the defence." But as this was a suit to establish title and recover possession, the Judge should, on the facts found (having regard to Regulation XVII. of 1827, Section 7, Clauses 1 and 2, and Bombay Act I. of 1865), have called upon the defendants to establish their right to hold possession as against the plaintiff's right of occupation. It may be that the defendants can show a countervailing right, but this is a point which the Judge has

failed to inquire into and determine. We are unable to find facts, and we must, therefore, in reversing the Judge's decree, return the case for a fresh decision on the real merits. Costs to follow final judgment.

1875.

TRIMBAK
RA'NU
v.
NA'NA/
BHAVA'NI.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. GULAM ABA'S.

April 15.

The Code of Criminal Procedure, Sections 273 and 453—Appeal—Aggregate sentence.

For purposes of appeal the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence.

Semle, that where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed.

But if a separate sentence be passed on each head, *Held* that an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial, within the jurisdiction of the Appellate Court.

THIS was a reference, under Section 296 of the Code of Criminal Procedure, by H. M. Birdwood, Session Judge of Surat. The accused Gulam Abas was charged under Section 381 of the Indian Penal Code with having committed theft in his master's house on two occasions, and being convicted by S. P. Pandit, Magistrate F.C., he was sentenced for the first offence to suffer two years' rigorous imprisonment and to pay a fine of Rs. 50, or in default to suffer three months further rigorous imprisonment; and for the second offence was sentenced to receive sixty lashes with a cat-o'-nine tails. On appeal, the Session Judge, on a review of the evidence, reversed the sentence for the first offence, but was of opinion that he had no jurisdiction to deal with the sentence passed for the second. He, therefore, reported the proceedings for the orders of the High Court.

The reference was heard by WEST and PINHEY, JJ.

No one appeared either on behalf of the accused person or the Crown.

PER CURIAM:—The prisoner Gulam Abas was tried at the same time for two instances of the same offence. For such a trial provision is made by Section 453 of the Code of Cri-

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minal Procedure. It does not seem absolutely necessary that in such a case there should be more than a single sentence, but if a separate sentence be passed on each head, an appeal brings the aggregate of those separate sentences as together constituting the punishment awarded in a single trial, within the jurisdiction of the court which is competent to hear an appeal. In other words, the whole punishment awarded to one person on one trial is to be regarded for the purposes of appeal as one sentence. The High Court could not properly on review deal with the evidence. It, therefore, directs that the Session Judge dispose of the case himself.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

April 19.

Special Appeal No. 280 of 1874.

NA'RAYA'NBA'BA'JI DA' BHOLKAR. *Plaintiff and Appellant.*

PA'NDURANG RA'MCHANDRA } *Defendants and Respon-*
DA' BHOLKAR and another } *dents.*

Suit for partition—Omission of a mortgaged field from claim—Subsequent suit—Civil Procedure Code, Section 7—Limitation—Separation in living and separation by partition.

In 1861 the plaintiff brought a general partition suit (No. 1363) to recover his share of the family property in the possession of the first defendant and did not include in that claim a field then in the possession of a mortgagee. The field was subsequently redeemed by the first defendant, who again mortgaged it to the second defendant. The plaintiff then filed the present suit to recover his share in the field. The first court allowed the plaintiff's claim, but the District Judge in appeal threw it out, on the ground that it was barred both by Section 7 of the Civil Procedure Code and by the Law of Limitation. The Judge based the latter finding on certain allegations made by the plaintiff in Suit No. 1363, and in another suit brought by him against the first defendant and the then mortgagee of the field, from which allegations the Judge inferred a separation between the plaintiff and the first defendant :

Held in special appeal that the claim was not barred by Section 7 of the Civil Procedure Code, because the mortgaged field was not available for an actual partition at the time of the former suit, No. 1363 of 1861. *Held* also that the suit was not barred by limitation, because the possession of the first defendant, or of his mortgagee, was not adverse to plaintiff, the alleged separation being only a separation in living, as distinguished from a separation by partition.

The true question for consideration in cases of this kind is whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second, and where the former suit is one for an actual division of property, the plaintiff is not bound in it to ask for a declaration defining his right in property not then capable of division.

Balkrishna Withal v. Harishankra (8 Bom. H. C. Rep. 64 A.C.J.) followed.

1875.

NA'RA'YAN
BA'BA'JI
v.
PA'NDURANG
RAMCHAN-
DRA.

THIS was a special appeal from the decision of R. W. Hunter, District Judge of Ratnágiri, in Appeals Nos. 302 and 331 of 1873 from the Subordinate Judge of Málwán.

The 'special appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA's, JJ.

Shántarám Náráyan for the appellant.

Ghanashám Nílkant and *Shámroiv Withal contra.*

The facts of the case and the argument of the pleaders on either side fully appear from the following judgment delivered by

KEMBALL, J. :—The *thikán*, a half share of which the plaintiff now seeks to recover, was alleged to be joint ancestral property, mortgaged by Rámchandra, the father of the first defendant, for Rs. 200, and subsequently redeemed by the first defendant, after his father's death, on the 30th April 1871. The plaintiff, as a half-sharer with Pándurang Rámchandra, the first defendant, thereafter applied to him for possession of his half share, offering to pay half the money advanced, to Rámchandra on the mortgage. This application was refused, and accordingly the present action was brought against Pándurang and the second defendant (who holds under Pándurang) to recover the said half share. Pándurang pleaded, 1st, that the plaintiff had no share in this *thikán* at all, and that, even in the ancestral estate, he had only one-fourth and not half share; 2nd, that the *thikán* in question was purchased by his father and another, after his father and the plaintiff's father had separated, and that his father mortgaged it; 3rd, that he succeeded by inheritance to the entire *thikán*, which he redeemed for Rs. 825, the greater portion of which was advanced by the second defendant upon the security of the *thikán*, which is now held in mortgage by

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RA'MCHAN-
DRA.

him ; and 4th, that the plaintiff's statement, that they were still in union, was false. The second defendant, Sitárám Kámat, generally denied the plaintiff's right, and pleaded that he could not be deprived of his security without the mortgage money being re-paid. The Subordinate Judge having framed fitting issues, held on the evidence, 1st, that the plaintiff was owner of a half share in the *thikán* in question ; 2nd, that he was entitled to redeem that half on payment of Rs. 100 ; and 3rd, that the defendant Pándurang had failed to establish his competency to mortgage the plaintiff's share, and passed a decree in the plaintiff's favour. Both the defendants then appealed to the District Judge on the following grounds :— That the claim was time-barred ; that the *thikán* was acquired by Pándurang's father after separation ; that the *thikán* was the sole property of Pándurang ; that, even if the plaintiff had a right by union, he was bound to pay his share of debts before recovering his half share of the *thikán*, and that the defendant Sitárám was entitled to be paid the whole of the money advanced by him before he could be dispossessed of any portion. The District Judge proceeded at the outset to consider whether the claim was barred, 1st, by Section 7 of Act VIII. of 1859, and 2nd, by the law of limitation ; and finding on these two issues against the plaintiff, he reversed the decree of the Subordinate Judge, and rejected the claim.

Both the courts below have found that the plaintiff and the first defendant are members of the same family, and the District Judge observes that—"The genealogy (23), which is admitted by all the parties for the purposes of this suit, shows them to be second cousins, having one great-grandfather in common." But before we proceed to consider the grounds on which the District Judge has refused to entertain the plaintiff's claim, we think it necessary to sketch briefly the course which the litigation between these two cousins has taken. It appears that, on the 27th April 1861, the plaintiff Náráyan Bábáji Dábolkar brought four separate suits against the first defendant, Pándurang, numbered respectively 1357, 1363, 1364, and 1375. One of these, 1363, was against Pándurang alone, in respect of such of the joint family pro-

perty as was then in his actual possession, to enforce partition and to obtain delivery to Náráyan of his share in such property, and the remainder were against Pándurang, coupled with others, to enforce a partition and to recover possession of such portions of the joint property as were in the hands of such other persons.

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 NA'RA'YAN
 BA'BA'JI
 v.
 PA'NDURANG
 RA'MCHANDRA.

In the general partition suit, as it may be styled, 1363, Náráyan obtained the decree sought, which was apparently not appealed against; but his efforts in the others were attended with varied success.

In 1364, Náráyan sued for partition and possession of a share in a particular field in the possession of Pándurang and other sharers. Pándurang alone defended the suit. He alleged that his father had acquired the field after separation and the plaintiff had no share. However, the Munsif decreed for the plaintiff, and this decree was upheld in the Senior Assistant Judge's Court and again in Special Appeal 710 of 1865, decided on the 16th March 1866.

In 1375, Náráyan sued for partition and possession of a share of a *thikán* as against Pándurang and the heirs of the purchaser from him (Bápu Kámble). Pándurang denied that the *thikán* was joint family property and that the plaintiff had ever any interest in it. Both the Munsif and the Joint Judge held that the land in dispute was proved to have been the joint property of Náráyan and of Pándurang, and that Náráyan was entitled to his share subject to the mortgage made by Pándurang's father, Rámchandra, and the Joint Judge's decree was affirmed in Special Appeal 219 of 1866 on the 10th January 1868, *vide* 5 Bom. H. C. R. A.C.J. 30; and we now come to the fourth suit, 1357, which it will be necessary to give somewhat more in detail. It relates to the identical *thikán*, the subject of the present suit. In that suit Náráyan sought as against Pándurang Rámchandra and Rámchandra Kámat Bhangle to compel partition and to recover possession of half of this *thikán*, which was in Bhangle's possession, as mortgagee from Pándurang's father. The mortgage which Náráyan spoke of was one effect-

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RA'MCHAN-
DRA.

ed in 1840. The defendants, however, put in two further mortgages of 1844 and 1850, saying that they had superseded the first mortgage of 1840. The plaintiff's pleader was questioned by the Munsif as to the mortgages of 1844 and 1850, and he refused to acknowledge them; and as the defendants denied the existence of the mortgage of 1840, and those of 1844 and 1850 only bound Pándurang, the Munsif decreed possession to the plaintiff of his share, free of any encumbrance. In Regular Appeal, the District Court of Ratnágiri reversed the Munsif's decree, on the ground that Náráyan had failed to prove his position in the family, but this ruling again was reversed in special appeal, and the case remanded to be determined on its merits. On remand, the District Court held that Náráyan could not sue to redeem only a portion of the mortgaged property the mortgagee, Bhangle, being entitled to have the whole redeemed. Then Náráyan brought a suit, 341 of 1871, against Pándurang and Bhangle to redeem the whole, but as it then appeared that in the short interval, Pándurang had redeemed the property from Bhangle, Náráyan's suit was thrown out. Pándurang, however, only redeemed the property to again mortgage it to Sitárám Kámat. The present action, therefore, was brought against Pándurang and Sitárám Kámat to recover Náráyan's share in the said *thikán*.

Having thus given an outline of the previous suits between these two parties, it will be sufficient to state shortly the reasons, so far as we understand them, which have impelled the Judge, without going into the merits, to hold that the plaintiff's claim is now barred. He considered first, that the subject-matter of the present claim should have been included in the general partition suit 1363 of 1861 and, therefore, that Section 7 of Act VIII. of 1859 disallowed the present suit, and second, that as Náráyan admitted in his plaint in suit 1363 of 1861 "that he had been separated from the first defendant no less than 28 years before," and also that as his pleader had in suit 1357 of 1861 repudiated the mortgage-bonds of 1844 and 1850, therefore his claim

was, moreover, time-barred ; and he further held that the ruling in 8 Bom. H. C. R. 64 A: C. J. could avail Náráyan nothing “because, from his own plea in Original Suit 1363 of 1861, it is evident that the possession of the first defendant’s mortgagees under instruments executed after the plaintiff’s separation from the first defendant, should have been treated by the plaintiff, when he brought that suit, as a possession under the first defendant, but adverse to himself.” But are these preliminary objections to the maintenance of the present action well founded ? To take first the question of limitation—the Judge rests his decision on certain admissions made by the plaintiff and his pleader respectively. With regard to the allegation contained in the plaint in Original Suit 1363 of 1861, we think that the Judge has placed an interpretation upon it, which it does not necessarily bear. It appears to us that the Judge has confounded separation in living with separation by partition of property. The one does not of necessity involve the other, and it may well be that all the plaintiff intended to say was that he had commenced to live apart from the defendant no less than 28 years before, and that admitted fact would not in itself tend to make the possession, by any one member of the family, or by an encumbrancer under an encumbrance created by the manager for family purposes, adverse to any one member ; and as regards the reply of the plaintiff’s pleader in Original Suit 1357 to the effect that he did not admit the mortgages of 1844 and 1850, it is sufficient to say that that answer, putting upon it a construction most unfavourable to the plaintiff, is not conclusive proof of the accrual to the plaintiff of the cause of action in 1844. It may be that the subsequent mortgages, though made without the knowledge and consent of the plaintiff, were made under circumstances which rendered them binding on all the members of the family, or that the original charge continued notwithstanding further advances were made on the same security. It might be a question whether the plaintiff was responsible, in respect of his share of the land, for the subsequent loans, but it would not necessarily follow that the possession of the

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encumbrancer commenced and continued to be adverse to him from the date of such loans. On the whole, we are of opinion that the facts set forth by the Judge were not such as to justify his determining summarily that the maintenance of the plaintiff's claim was barred by the law of limitation. We will, therefore, proceed to discuss the other question, whether the provisions of Section 7 of the Civil Procedure Code are a bar to the institution of the present suit. The Judge held that the plaintiff was bound to have included this claim in his suit 1363, and he decided, when this Court's judgment in Special Appeal 419 of 1870 (*vide* 8 Bom. H. C. R. 64 A. C. J.) was quoted, that it availed him nothing, because, by reason of the admissions above considered, he should have treated the possession of the particular *thikán* now in dispute as under the defendant Pándurang, but "*adverse to himself*." We have already decided that the encumbrancer's possession did not necessarily become adverse to the plaintiff in 1844, so that the reason for not applying the ruling in the 8th Volume disappears. But it is argued for the respondents, in opposition to that judgment, that as the cause of action was the right, which the plaintiff possessed as a member of the joint family, to demand a partition, he was bound, by Section 7 of the Civil Procedure Code, to include in one suit all the joint property in respect of which he had a right to, and desired a share and that it was not competent to him in another suit, filed either on the same day or at any subsequent period, to ask for a division of any property omitted from the first : and in support of the contention that the cause of action was the same, our attention has been drawn to the ruling of a Division Bench of this Court in S. A. No. 219 of 1866 in 5 Bom. H. C. R. 30 (noted above when speaking of Original Suit 1375). But this judgment cuts both ways as far as it affects the respondent's case, though, indeed, we are not inclined to attach much weight to it. The fact of the plaintiff having but one cause of action appears to have been accepted without much consideration, and assuming the fact ourselves for a moment we certainly cannot at all assent to the proposition which

follows. On the other hand, we think the judgment in the 8th Volume strictly right in principle. The true question for consideration in cases of this kind appears to us to be whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second suit, and in order to apply that test to the present case, it is necessary to bear in mind the two-fold application of the word "partition." There may be a division of right in joint property, and there may be a division of the property itself, *i.e.*, by metes and bounds. Very probably this distinction may have been in the mind of the plaintiff, at least as regards those portions of the family property in the hands of encumbrancers, when he brought his four suits simultaneously. However that may be, it is abundantly clear that the plaintiff, in his suit 1363, could not have recovered precisely that which he now seeks to recover, for the reason that, in that suit, he sought a division of property, whereas this particular *thikān*, being then in the possession of a mortgagee, was not available for an actual partition. It has been pressed upon us that the plaintiff *might* have asked for "a division of right" in respect of this property in the former suit 1363, but that is not the question. He sought for a division of property as against Pandurang, and, in respect of this property, he had then no such cause of action against him. Section 7 of the Civil Procedure Code did not render it obligatory upon the plaintiff either to include this division of right in his suit for division of property or to abandon for the future all hope of establishing it by an action; and on this point we would refer to a judgment of the Madras High Court, in the case of *Pattaravay Mudali v. Audimula Mudali* (a), which discusses in connection with it the meaning of the words "cause of action."

Differing from the District Judge on the two preliminary objections presented to him, the result is that the case must go back to be heard and determined on the merits. As the

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Judge appears to think that the plaintiff is to blame for the complications which have arisen, we must observe that, in our view, the plaintiff has done all that he could be expected to do to obtain his right, and where he has been unsuccessful, his case, whatever may be the merits of his claim, is not undeserving of sympathy.

We reverse the decree of the District Court, and remand the case in order that the appeal from the decree of the Subordinate Judge may be heard and disposed of on its merits. Costs to follow final judgment.

[APPELLATE CIVIL JURISDICTION.]

March 21.

Regular Appeal No. 27 of 1873.

MIR AJMUDDIN KHA'N, heir } (*Plaintiff*) *Appellant*.
of FA'TMA' BEGAM

ZIA'-UN-NISSA' BEGAM and } (*Defendant*) *Respondent*.
another.

Sanction—Act XVIII. of 1848—Slavery—Act V. of 1843.

The permission of Government in 1858 to the Agent for the Governor of Bombay at Surat to pay certain moneys of the widow of the late Nawáb of Surat to whomsoever a certificate of heirship to her might be granted by the civil court is not a sufficient authority under Act XVIII. of 1848 for the institution against her granddaughters of a general civil suit under Regulation IV. of 1827 or Act VIII. of 1859. Nor does permission given in 1871 to institute a suit authorise the continuation of a suit instituted in 1869.

The effect of Act V. of 1843 is to prevent the enforcement of any rights, which would, if that Act had not been passed, have arisen out of the status of slavery; and a suit, brought by the heir of the master of a slave-girl, emancipated by and married to such master, in his lifetime, to recover, as such heir, her property in the hands of persons descended from her, is one the cognizance of which is barred by Section 2 of the Act.

THIS was an appeal from the decision of W. H. Newnham, Judge of the District of Surat.

The original plaintiff, Fátma Begam, who is now dead, and whom Mir Ajmuddin Khán represents in this appeal, sued the defendants to recover certain property, moveable and immoveable, which belonged to Amir-un-nissá Begam, wife of Afzuluddin Khán, the last Nawáb of Surat, alleging that this

property was awarded to Amir-un-nissá Begam by the Agent for His Excellency the Governor, but since her death, on November 10, 1857, had been detained by the defendants; whereas Amir-un-nissá having been originally a slave-girl purchased by the Nawáb, the property went at her death, not to the defendants, her grand-daughters, but to the plaintiff, Fátmá Begam, as heir to her brother, the late Bakshi Mir Mohinuddin Khán, the heir of the said Amir-un-nissá.

The defendants contended, *inter alia*, that the suit was barred by Acts V. of 1843 and XVIII. of 1848, and that they, and not the plaintiff or her brother, were the legal heirs of Amir-un-nissá.

The District Judge rejected the plaintiff's claim with costs, on the grounds that the plea as to Amir-un-nissá's alleged state of slavery was inadmissible under Act V. of 1843, and that, even if admissible, it was not established.

The appeal was heard by WESTROPP, C.J., and KEMBALL, J.

Pirozesháh Mihirvánji Mehtá (with him *Khanderáv Moroji*) for the appellant.

Shántarám Náráyan for the first respondent.

Starling and *Dhirajlál Mathurádás*, Government Pleader, for the second respondent.

Pirozesháh Mehtá:—Independently of the grounds on which the Judge below relied, there was the express sanction of Government obtained on the 27th October 1871, which, though given after the institution of the suit, was nevertheless prior to the issue of any writ or process, which was all that was required by Section 1 of Act XVIII. of 1848. As to the objection that the sanction is for the institution of a suit, the operative words of the sanction simply say that the sanction required by the Act is given. With regard to the point that the suit is barred by Section 3 of Act V. of 1843, that section does not apply to the present case, in which the respondents derive their rights from a person holding the status of a freed woman, not to use the misleading term, an emancipated slave—a status, as in the civil law, with dis-

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tinctly different rights and liabilities from that of a slave.

Under the Muhammadan law besides, the respondents cannot be said to have acquired possession of the property in dispute by *inheritance* from the freed woman (3 Hedaya 444-45; 1 Baillie Dig. 386-87).

As to Section 2 of Act V. of 1843 pointed out by this Court, it is only intended for the common cases in which masters arrogate certain powers over the person and services (the section leaves out the word property) of their slaves. It does not apply to a case in which rights of inheritance are claimed to the estate and in the property of a freed woman.

WESTROPP, C.J.:—We affirm the decree of the District Judge, *first*, because no sufficient sanction was given by Government to satisfy Act XVIII. of 1848.

The permission of Government given in 1858 to Mr. Herbert, the Agent for the Governor of Bombay, to pay over certain money of Amir-un-nissá to whomsoever a certificate of heirship to her might be granted by the civil court, would have authorized an application under Regulation VIII. of 1827 (Act XX. of 1864, under which certificates of administration may be obtained, not having then been passed), but certainly would not authorize the institution against the defendants of a general civil suit under Regulation IV. of 1827, or under the Civil Procedure Code, Act VIII. of 1859, brought, as the present suit was, eleven years after the order of the Bombay Government.

Nor did the permission given by Government in Mr. Wedderburn's letter dated the 27th October 1871, to institute a suit, authorize the continuation of a suit already instituted, as the present suit was, so far back as the 8th of November 1869. We see nothing to lead us to suppose that Government intended (if it could do so, as to which we say nothing,) to deprive the defendants of any benefit arising to them from the lapse of time.

We refrain from deciding whether, having regard to Act XVIII. of 1848, the plaintiff could lawfully file a plaint against the defendants without the consent of Government.

first obtained, or whether the court had any jurisdiction to receive such a plaint. It is sufficient for us to say that there was not any such consent of Government to the issuing of any process, to bring the defendants before the court in a suit such as this, instituted in 1869, or to proceed with it beyond the filing of the plaint, as Act XVIII. of 1848 at the very least requires.

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Secondly.—We think that Act V. of 1843 deprived the plaintiff of any right to bring this suit. Amir-un-nissá died in 1857, when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights, which would, if that Act had not been passed, have arisen out of the status of slavery. The right claimed by the plaintiff rests solely upon the alleged fact that Amir-un-nissá had been at one time the slave of the late Nawáb. He is said by the plaintiff to have enfranchised Amir-un-nissá; and on the authority of 1 Baillie's Dig. 386-87, and 3 Hedaya 444-45, it is contended that he, as her emancipator, or, he being dead, his nearest male relative, or in default of him, that male relative's heir, would be her heir, and that neither her daughter nor the defendants, who are that daughter's daughters, are so. That right, if it ever existed, is, in our opinion, one arising out of an alleged property of the late Nawáb in Amir-un-nissá's person and services before he enfranchised her, and as such is one of the rights which every civil court in British India is prohibited, by Section 2 of Act V. of 1843, from enforcing. We are not prepared to say whether this case would not also come within the prohibition in section 3 of the same enactment.

It is unnecessary for us to give any opinion as to whether the doctrine laid down in 1 Baillie's Dig. 386-87 and in 3 Hedaya 444-45 would apply to such a case as the present, in which the plaintiff substantially admits that the mother of the defendants was the legitimate daughter of the emancipator (the Nawáb) by the emancipated (Amir-un-nissá), nor do we think it necessary to give any opinion as to the extent to which the defendants are bound by the admission

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We also deem it unnecessary to give any opinion on the question as to whether or not Amir-un-nissá had been a slave. Assuming that she had been so, as contended on behalf of the plaintiff, we, for the reasons already stated, hold this suit to be unsustainable.

The decree of the District Judge must be affirmed, with one set of costs of this Regular Appeal, to be paid by the plaintiff to the defendants.

Decree affirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 423 of 1872.

1873.
August 13.

RA'VJI SHIVRA'M JOSHI... (*Original Plaintiff*) *Appellant.*

KA'LURA'M, son of MALUK-
CHAND, deceased, his widows } (*Original Defendants*)
and heiresses, CHABA'BA'I } *Respondents.*
and BHAGA'BA'I, and another.)

Decree—Execution—Application after decree—Act XXIII. of 1861, Section 11
—Mortgage—Redemption.

An application to the court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.

The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose.

J'noji v. Byaukatesh (2 Bom. H. C. Rup. 371) over ruled.

THIS was a case referred for the decision of a Full Bench by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J. The reference was heard by a full bench consisting of WESTROPP, C.J., MELVILL, WEST, and NA'NA'BHA'I HARIDA'S, JJ.

Bahiravnáth Mangesh for the appellant.

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Dhirajlál Mathurádás (Government Pleader) for the respondents.

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The facts and arguments sufficiently appear from the following judgment of the full court delivered by

WESTROPP, C.J.—This is a suit for the redemption of a mortgage. Kálurám (whose widows are, as his heirs, the defendants and respondents here) having, as heir of the mortgagee, obtained, in regular appeal in the Zillah Court, a decree, on the 12th September 1850, against the mortgagor for Rs. 262-13-0 due in respect of the mortgage, with this direction, “and it is further ordered that if the defendant (the mortgagor) fail to pay, the plaintiff is to be placed in possession for the amount claimed” (Rs. 262-13-0). That was the ordinary decree to put an unpaid mortgagee in possession, which possession he might retain until he was paid in full. Mr. Dhirajlál Mathurádás, for the present defendants, made a preliminary objection that this suit for redemption will not lie, inasmuch as, he contends, the mortgagor’s only proper mode of recovering possession is by an application, in the possession suit, for further execution of the decree of the 12th of September 1850, which course, he says, is prescribed by Section 11 of Act XXIII. of 1861, and was successfully pursued in the following unreported miscellaneous cases : *Gangákrishna v. Náranbhái*, decided by SAUSSE, C.J., and TUCKER, J., on the 13th April 1866 ; *Dattátraya v. Rangu Shámji*, decided 4th April 1868 ; and *Himatsing v. Gangádás and others*, decided 28th April 1870. Those authorities were cited to Nánúbháí Haridás, J., and myself when this special appeal first came before us in the Division Court on the 23rd of July last, and we, being of opinion that they were unsustainable in law, and not being inclined to follow them, referred to a Full Bench the following questions :—

1st.—Whether an application to the court which passed the previous decree for possession in favour of the mortgagee’s heir, for further execution thereof by taking an

1873. account, &c., is, as held in those cases, the proper mode
 RĀ'VJI SHIV. for the mortgagor to redeem the lands from the heirs of the
 RA'M JOSHI mortgagee, and to recover possession thereof from them.
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2nd.—Whether, if such be the case, a separate suit for redemption is prohibited by Section 11 of Act XXIII. of 1861.

We are unanimously of opinion that the first question must be answered in the negative.

In addition to the cases already mentioned, *Jānoji Bānāji v. Vyankatesh Shrinivās (a)* was cited to the Full Court in support of Mr. Dhirajlāl Mathurādās's objection. We think, however, that neither it nor the three unreported cases can be sustained, inasmuch as, when Kālurām, the heir of the mortgagee, was put into possession of the mortgaged premises, the decree of the 12th September 1850 was fully executed, the suit in which that decree was made being really nothing more than a suit in the nature of an ejectment, by an unpaid mortgagee, of the mortgagor from the mortgaged premises. A proceeding for redemption of those premises is not a question "relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, or a question relating to the execution of the decree," which we hold to have been fully executed when Kālurām, the heir of the mortgagee, was put into possession under the decree. Were we to hold that a mortgagor might apply, in a possession suit, for an account and redemption on the ground that such a proceeding was in further execution of the decree for possession in favour of the mortgagee, it would follow that the mortgagor would be barred, if the mortgagee had been in possession for three years under that decree—a result which we feel certain the Legislature never contemplated, and which would be quite contrary to the spirit of clause 15 of Section 1 of Act XIV. of 1859 and Articles 147, 148, and 149 of Schedule II. of Act IX. of 1871.

The answer of this Court to the first question being in the negative, the second question does not arise. It follows, as a necessary consequence of our answer to the first question, that the proper course for the mortgagor who seeks for an account and redemption, or redemption alone, is to bring an independent suit for that purpose.

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[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 24 of 1874.

1875.
January 15.

RA'MCHANDRA BALLA'L *Plaintiff and Appellants.*
BA'BA'ESGONDA and others. *Defendants and Respondents.*

Decree—Execution—Application after decree—Act XXIII. of 1861, Section 11—Mortgage—Possession—Redemption.

A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgagee should remain in possession until the mortgage debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to the possession of the mortgaged property. Both the lower courts granted the mortgagor's application.

On special appeal, *held* (following the decision of the Full Bench in *Ravji Shivram Joshi v. Kdluram Malukchand*, ante p. 161) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.

THIS was a miscellaneous special appeal from the order of H. J. Parsons, Assistant Judge at Ratnagiri, affirming the order of the Munsif of Málwan.

The facts of the case are briefly these:—In 1862 Rámchandra sued the defendants, Bábu and others, on a mortgage, and obtained a decree against them, that he was to be put into, and continue in, possession of the mortgaged property until the defendants paid him Rs. 499. Under that decree, Rámchandra was put in possession of the property in 1872. On the 16th October 1872, the defendants paid Rs. 499 into court, and applied for restoration of the possession of their property. This application was made under Act XXIII. of

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1861, Section 11. The plaintiff contended that his mortgage decree against the defendants had been fully executed when he obtained possession under it, and that they should bring a fresh suit to redeem the property, and not seek to obtain it by an application under his mortgage decree. Both the lower courts ordered the plaintiff to receive the money and restore the mortgaged property to the defendants. In special appeal it was again contended that the decree obtained by the plaintiff had been completely executed, when he was put into possession, and that it could not be executed a second time at the instance of the defendants, who should bring a regular suit to redeem the property.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 15th January 1875.

Ghanashám Nilkanth for the appellant :—The question raised in the present case has already been decided by a Full Bench of this Court in special appeal No: 423 of 1872, decided on the 13th August 1873.

Shántúrám Náráyan contra.

WESTROPP, C.J. :—The Court reverses the order of the District Judge of the 21st June 1873, and the order of the Subordinate Judge of the 17th January 1873, with costs. This decision is in conformity with that of the Full Bench in S. A. No. 423 of 1872 (*Rávji Shivrám Joshi v. Kalurám Malukchand*), made on the 13th of August 1873. That was a suit by a mortgagor for redemption. The mortgagees, who had obtained possession under a decree in a suit brought by him for that purpose against the mortgagor, took a preliminary objection that such suit would not lie, inasmuch as the mortgagor's proper mode of recovering possession was by an application to the court in the former suit for further execution of the decree therein. Such an application had been successful in some unreported cases as well as in a case reported in 2 Bom. H. C. Rep. 371. Those cases, however, seemed to the Division Court to be unsustainable, and it referred to a Full Bench the question, whether an application to the Court, which passed the previous decree

for possession in favour of the mortgagee, for further execution thereof, by taking an account of what was due to the mortgagee, and, on payment by the mortgagor of the amount found due, by restoration to him of the mortgaged premises, is, as was held in those cases, the proper mode for the mortgagor to redeem the lands from the mortgagee and to recover possession of them from him. The Full Bench, principally on the ground that the previous decree for possession had been fully executed when the mortgagee was put into possession, overruled these cases, and answered the question referred to it in the negative. That decision completely governs the present case.

Orders of the lower courts reversed with costs.

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[APPELLATE CIVIL JURISDICTION.]

March 3.

Regular Appeal No. 76 of 1872.

KESHAV GOPA'L GINDE } *Defendants and Appellants.*
and two others..... }

RAYA'PA' and another ... *Plaintiffs and Respondents.*

Partnership—Rights of a deceased partner—Adjustment of a partnership account—Payments by partners—Presumption—Execution—Seizure of partnership property in execution against one partner.

A suit based on the right of a deceased partner cannot be limited to a demand for his share in the proceeds of property alleged to have come into the possession of the partnership during its existence. The agreement on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assets, if any, must all be taken into account, and the suit must demand such a sum, if any, as, on a general account, and an account between the deceased partner and the co-partnership, being taken, shall appear to be due.

Payments made by the different partners of a firm are presumed to have been made out of the funds of the firm where the contrary is not proved by any satisfactory evidence, and when a firm consisting of two members is dissolved by the death of one partner, the presumption is that the deceased was entitled to a moiety of the existing assets.

It is an improper way of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property, to sell that part, and then distribute the proceeds between the executing creditor and the other partners of the firm.

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KESHAV GO.
PA'L GINDE
v.
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. Principle on which the account of a dissolved partnership should be adjusted, explained.

THIS was a regular appeal from the decision of Dayarám Mayarám, First Class Subordinate Judge of Belgaum.

The plaintiffs (1 Rayápá and 2 Keshav Hari) brought this suit against Keshav Gopál Ginde, 2 Apaná More, and 3. Krishnáji Ginde, and sought to recover from them 805 logs of timber (measuring 1,206 *candies*), or their value, Rs. 34,155. The plaintiffs stated that a partnership was formed between the first plaintiff's brother, Balápá (now deceased), and the first defendant, Keshav Ginde, each having a half share in the profit and loss thereof; that the second plaintiff was a sub-partner under the deceased Balápá, and similarly the second and third defendants were sub-partners under the first defendant; that on the 11th June 1862 the partners purchased from one Vithal Káshiráv Bhende 2,210 logs of timber, consisting of teak, black-wood, and mutti, and measuring 2,412 *candies*, for Rs. 12,000; that Balápá died shortly after the timber had been collected in the Godhavli forest; that subsequently the defendants sold off the whole timber; that they had in their possession the deed of purchase from Vithal Bhende, and all the papers and books relating to the partnership transaction; that out of the originally purchased 2,210 logs (measuring 2,412 *candies*) the plaintiffs had a right to 1,105 logs (measuring 1,206 *candies*); but that as three hundred logs had been sold in execution of a decree against the deceased Balápá, by which sale Balápá's judgment-creditor had realized Rs. 2,025, the plaintiffs allowed a deduction of 300 logs (or their realized value, Rs. 2,025), and claimed from the defendants 805 logs, or their value as mentioned above. The defendants denied the plaintiffs' claim, and stated that Balápá himself had sold the timber and kept the money and papers belonging to the partnership. The Subordinate Judge found the quantity of timber, that came into the possession of the partnership from Vithal Bhende, to be 1,948 *candies*, there being a short delivery of 464 *candies*, and fixed the measurement of the three hundred logs sold under the decree against Balápá, at 533 *candies*, and gave to the plaintiffs

a decree for 7,007½ logs, or in default, their value, Rs. 21,225. He fixed 533 *candies* as the quantity sold in execution, solely from the fact that the plaintiff Rayápá himself set the value of the 300 logs at Rs. 16,000 in a petition which Rayápá had presented for the removal of the attachment placed on the 300 logs by the deceased Balápá's execution-creditor. The defendants thereon preferred an appeal to the High Court against the decree of the Subordinate Judge.

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PAL GINDE
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The appeal was argued before WEST and NA'NA'BHA'I HARIDA'S, JJ.

Latham (with him *Dahiravnáth Mangesh*) for the appellants.

Farran (with him *Vishnu Ghanashám*) for the respondents.

The Court remanded the case for a fresh finding by the Subordinate Judge, with the following observations as to the manner in which the partnership account was to be made up:—

WEST, J.:—The suit in this case was so erroneously constituted, and has been conducted with so imperfect an appreciation of what was essential for its proper disposal, that the Court must send it back to the court of first instance for a fresh investigation directed to the points that really arise between the parties. A suit based on the rights of a deceased partner cannot properly be limited, as was this one, to a demand for his share of the proceeds of certain property alleged to have come into the possession of the firm or partnership. The agreement, on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assets, if any, must all be taken into account, and the demand must be for such a sum, if any, as, on a general account and an account between the deceased partner and the co-partnership being taken, shall appear to be due. It was almost futile to go through a long investigation of how many logs of teak and mutti had come into the hands of the partners in this case and of the prices at which they might possibly have sold them, while no

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advertence was had to the equally important questions of the amounts, brought into the partnership and expended for it by the several partners, and of the loss inflicted on the partnership by the forced sale of a quantity of its timber in execution of a decree against Balápá alone. * * *

The total quantity of timber purchased from Government by Vithalráv, the vendor of Balápá, and the defendants, seems to have been 2,412 *candies*. This was re-sold at a profit by Vithalráv to the partnership; but before the timber was delivered by Government, a quantity of it was destroyed in a jungle fire. The allowance made by Government on this account was Rs. 1,000. The suggestion that a larger sum was allowed is not supported by any testimony that can prevail against the Government accounts showing this precise sum, nor do the Court think it likely that Vithalráv accepted an allowance smaller in proportion to the whole price than the quantity destroyed in proportion to the whole quantity purchased. The Subordinate Judge has estimated the quantity destroyed according to this proportion as 463½ *candies*, and this the Court think the most reasonable determination on the point that he could have arrived at.

After the timber had been collected, 300 logs were attached and eventually sold in execution of a decree against Balápá alone. The defendant Keshav's application to raise the attachment on the allegation that Balápá (now deceased) had had no right to the property was rejected, but one-half of the proceeds was made over to him. It was an improper way of executing the decree against Balápá merely to seize part of the partnership property, to sell that part and then distribute the proceeds between Balápá's partners and his judgment-creditor, but this having been done and being irreversible, Balápá's representatives must account for the loss thus occasioned to the common assets. What this loss was has been variously computed by the parties and by the Subordinate Judge. The latter, taking the value of the whole 300 logs, as set forth by the plaintiff Rayápá, and the price per *candy* as estimated in the plaint, has arrived at the conclusion that the quantity was 533 *candies*, but if, as

Rayápá averred in his petition No. 135, the timber was worth Rs. 16,000, it is hardly possible that it should not have contained more than 533 *candies*. It appears from defendant Krishnáji's agreement with Government (145) that teak could be bought for delivery in Belgav at Rs. 2½ a cubic foot and mutti at Rs. 2½ a foot. The price that could be realized at Tavargati would probably be some 2 or 3 rupees a *candy* less than these prices. It is probable and almost certain that a judgment-creditor, with an order empowering him to attach and sell 300 logs out of nearly 2,000, would seize the best he could find, and it may be assumed that the logs actually taken in execution were of teak timber and of a large size. The *kulkarni* of the village estimates them as weighing about 350 *candies*, which is but a trifle over the average weight of the 2,210 logs all round. Rayápá's estimate of the value at Rs. 16,000, on the other hand, is probably quite as excessive in the other direction, and to form an estimate of the quantity by dividing this sum by Rs. 30, Rayápá's valuation of a *candy*, was a very unsafe way of proceeding, because, according to the notions of the parties, and indeed of the Subordinate Judge himself, the plaintiffs had nothing to lose by an excessive valuation as to the 300 logs, while they had much to gain if this valuation could be extended to the remainder of the timber. Amongst the other numerous anomalies of the case, it appears that the plaintiffs served the defendants with a notice to produce the accounts relating to the purchase and sale of the timber. Those accounts do not seem to have been produced or called for on the further hearing of the cause. If they can be procured, the Subordinate Judge may learn from them what is the cost of carriage of timber per *candy* from Tavargati to Belgav, which the Court understands to be the nearest mart. Their evidence should be supplemented by independent testimony, and when the Subordinate Judge has thus satisfied himself of the cost of conveying timber from Tavargati to Belgav, he may fairly estimate the proper price at the former place by deducting such cost per *candy* from the selling price of Rs. 2½ a *candy* at the latter. The same accounts, by

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showing how many *candies* were removed and sold after the attachment, may enable the Subordinate Judge to say with approximate certainty to how many the attachment extended. In the absence of this testimony, the quantity cannot, the Court thinks, be taken to be more than 450 *candies*, an estimate which allows the logs attached to have been about 50 per cent. more in bulk than the average. The quantity having been ascertained or approximately estimated as thus directed, Balápá's account with the partnership will be made up by debiting him with the proper price at Tavargati of the 450 *candies*, or other more accurately determined quantity of timber, and crediting him with the amount handed to the defendants as their moiety of the proceeds. Keshav's attempt to get the attachment removed by setting up his own sole title, and endeavouring to disprove Balápá's interest, was a fraudulent proceeding, which subsequent events have shown not to have been entered on with a view to the common advantage of the partners. Avábái, the widow of Balápá, appears to have been induced with some difficulty to lend her countenance to the endeavour, but Rayápá cannot fairly be charged with any part of the expenses thus incurred. The defendants must not, therefore, obtain credit for those expenses in making up their account with the partnership.

If, from or through the accounts, the Subordinate Judge can obtain satisfactory evidence as to how the remainder of the timber was disposed of, he must debit the defendants in account with the partnership with the amount actually and in good faith realized by its sale. If the accounts cannot be obtained or cannot be trusted, he must debit them with the fair market price of the timber estimated, as the Court have already indicated. On the other hand, he must credit them with all sums which they may prove that they actually and in good faith expended on behalf of the partnership. If they are willing to undertake the payment of outstanding debts due by the partnership, and the Subordinate Judge is satisfied of their solvency, he may credit them with such sums as are proved to be due, debiting them at the same

time with any assets of the partnership that may appear recoverable, but have not been actually recovered.

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Balápá's account with the partnership, of which the items requiring particular consideration have already been dealt with, should be made up on the same principles as that of the defendants. He is to be credited with sums reasonably and properly paid by him on account of the partnership, and debited with those paid to or for him. Rayápá's expenses in relation to the attachment are not to be charged against the partnership.

No written agreement embodying the terms of the partnership has been produced in the case. If such a document can be procured, the Subordinate Judge will procure it and will follow its provisions in finding on the distribution that should be made of the final assets. In its absence, he will follow the usual presumption that the capital was to be furnished in equal shares by each principal partner, and that the final assets are to be distributed in the same proportions. For sums above a moiety of the capital laid out by them, the defendants will be entitled to credit before a distribution. The balances finally found due to the partnership by the defendants on the one hand, and by Balápá on the other, will constitute its assets, which being equally divided, a moiety will be payable to the plaintiffs after deduction of the balance due by them to the firm.

The Subordinate Judge will prepare an account, as thus directed, taking fresh evidence, if tendered or procurable, on such material points as have not been disposed of, and will forward it with the evidence to this Court.

On receipt of the Subordinate Judge's finding, the case again came on for argument and disposal before WEST and NA'NA'BHA'I HARIDA'S, JJ., on the 3rd March 1875.

Lung (with him *Bahiravná Mangesh*) for the appellants.

Farran (with him *Vishnu Ghanashám*) for the respondents.

PER CURIAM :—We must, on such materials as are before us, determine that Keshav and the other members representing

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the firm are to pay the plaintiffs Rs. 17,590 as above.* The evidence fails as to who supplied the capital and on what terms the partnership was constituted. The payments made by the different partners for the firm were presumably made out of the funds of the firm, and the contrary is not proved by any satisfactory evidence. Hence we must fall back on the ordinary presumption that at the moment when the firm was dissolved by Balápá's death, he was entitled to a moiety of the existing assets, *i.e.*, Rs. 58,500, minus a debt for cart-hire of Rs. 300. His execution-creditor seized and sold Rs. 13,535 worth of timber, out of the proceeds of which Rs. 2,025 were handed back to Keshav. The account is made up accordingly, and the defendants must pay the balance to plaintiffs. Costs throughout in proportion.

* Balápá in account with Keshav & Co.

Dr.			Cr.
To Timber attached in execution	Rs. 13,535	By cash paid to Keshav on account of execution	Rs. 2,025
Balance	17,590	A moiety of remaining assets	
		58,500 — 300	
	31,125		= 29,100
		2	
			31,125

[APPELLATE CIVIL JURISDICTION.]

March 10.

Regular Appeal No. 65 of 1873.

GIRIA'PA' *Plaintiff and Appellant.*

JAKANA' and others *Defendants and Respondents.*

Hereditary office—Succession—Resumption—Adverse possession—Limitation.

J held the office of *Pátíl* more than fifty years ago as representative of two branches descended from a common ancestor, and then united in interest, there being two other branches descended from the same ancestor, but severed in interest from those represented by *J*. *J* having died in 1824, was succeeded by his son *T*, without any opposition from the two other branches. *T* was temporarily displaced from the office by *G*, who represented the two other branches but recovered it in 1850. In an action brought by the plaintiff, the representative of *G*, in 1873, to establish his claim to the office held by *T*'s sons, it was contended on behalf of plaintiff, in answer to de-

defendants' plea of limitation that in the absence of evidence of the circumstances under which *T* succeeded to the *Páttilship*, *T* must be presumed to have been nominated to that office by all the members of the *watandar* family jointly, or with their assent sought and granted, and was consequently the representative of all of them :

Held that the succession of a son to his father in an hereditary office is primarily to be referred to a right based upon the relation subsisting between them, just as would be the son's succession to his father's property.

Held also that the presumption thus arising against *T* having been a nominee of all the branches of the family, and not having been rebutted by any evidence of an assertion and admission of the rights of the other branches, *T*'s occupation of the *Páttilship* was adverse to the plaintiff's right, and being adverse at its beginning, it was equally adverse when, after a temporary displacement by *G* (whom the plaintiff now represents), *T* recovered it in 1850.

Held also that an interval of more than twelve years having passed between 1850 and the institution of the present suit in 1873, the claim was barred, and the possession of the office obtained by *T*'s representatives could not be disturbed.

THIS was a regular appeal from the decision of S. Tagore, Senior Assistant Judge in Kaládgi, in original suit No. 10 of 1873.

The plaintiff, Giriápá, brought this suit against the three sons of Timaná bin Jakaná, and prayed for a declaration that he was entitled to a fourth share in the *Páttilki watan* of Ingulgi and to officiate as *Páttil* in turn with the defendants. The Assistant Collector was also made a co-defendant, because he refused to enter the plaintiff's name in the *Páttilki* Register of the village. The first three defendants denied the plaintiff's right, set up an exclusive claim in themselves, and pleaded the Limitation Act, saying that they had been in uninterrupted enjoyment of the office for more than thirty years previous to the date of the plaintiff's suit. Mr. Tagore found that the plaintiff had originally a fourth share in the *watan*, but held that the members of the defendants' branch of the family had exclusively performed the office of the *watan* since the introduction of the British rule; that for about four years Timaná was deprived of his office by the plaintiff's brother, Govind; that the said Timaná, however, recovered the office from Govind, in 1850; that since that time the *Páttilship* continued in the possession of the said

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1875. *Timaná*, and after him of his sons and representatives, the
 GIRIA'PA' first three defendants, and that, therefore, the plaintiff's claim
 v. was barred. Mr. Tagore accordingly dismissed the plaintiff's
 JAKANA' suit with costs.

The appeal was argued before WEST and NA'NA'BHIA' HARIDA's, JJ., on the 10th March 1875.

Jardine (with him *Pakirápá*) for the appellant.

Farrán (with him *Dhirajlál Mathurádás*, Government Pleader,) for the respondents.

WEST, J.:—It seems to be well established, notwithstanding some vague and inconsistent evidence to the contrary, that *Jakaná* held the office of *Pátíl* more than 50 years ago as representative of two branches descended from a common ancestor, *Bhimaná*, and then united in interest. There were two other branches severed in interest from those represented by *Jakaná*, and, when *Jakaná* died, in 1824, if those branches had a right to nominate a successor, they ought then to have asserted it. *Jakaná* was in fact succeeded by his son *Timaná*, and *Timaná*'s succession implies, if unexplained, as it is, that the right to hold the office was confined to *Jakaná*'s line. It has been urged by Mr. *Jardine* that the circumstances, under which *Timaná* succeeded, do not appear, and he would have us infer that *Timaná* was nominated by all the members of the *watmulár*' family jointly, or took the office with an assent on their part, sought and granted which would make him their representative. There is some force in this argument, but we think that the succession of a son to his father in an hereditary office is primarily to be referred to a right arising from that relation subsisting between them just as would be his succession to property. A presumption thus arises against *Timaná*'s having been a nominee of all the branches of the family, and this presumption not having been met by any evidence of an assertion and admission of their rights, *Timaná*'s occupation of the *Pátílship* must be taken to have been adverse to the right now set up by the plaintiff, who belongs to one of the branches not represented by *Jakaná*. Having been adverse at its beginning,

it was equally adverse when after a temporary displacement by Govind, whom the plaintiff now represents, Timaná recovered it in 1850. Between that time and the institution of the present suit, there was an interval of more than twelve years, and the possession of the office obtained by Timaná's representative could no longer then be disturbed. If the plaintiff, Gíriápá, being united in interest with Timaná, had been necessarily represented, in the absence of a special agreement by Timaná, while Timaná was *pátíl*, his right would not of course have become practically extinguished by limitation, and thus it is that the plaintiff, Venkaná, in the other suit has been enabled to succeed, but here no union of interests has been averred as the foundation of the plaintiff's right. He has claimed merely as representative of a separated branch against which Timaná's tenure of the office was always adverse.

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We must therefore confirm the decree of the District Court with costs.

NOTE.—A review was applied for in this case, but the Court (WEST and NA'NA'BBA'I HARIDA'S, JJ.,) on the 23rd September 1875, rejected the petition, on the ground that no sufficient reason was shown for the review sought.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 229 of 1874.

March 9.

JUSAB HA'JI JA'FAR.....*Plaintiff.*

HA'JI GUL MUHAMMAD'.....*Defendant.*

Registration Act VIII. of 1871, Section 17, Clauses 2 and 3, Sections 18 and 49—Agreement for purchase of immoveable property contemplating a future conveyance—Payment of earnest-money.

A "bargain paper" for the purchase of immoveable property above the value of Rs. 100, which contemplates the execution of a future conveyance does not require registration.

THIS was a suit, tried by Sir C. SARGENT, J., in a Division Court on the 15th January 1875, for specific performance of an agreement to purchase two houses. The agree-

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ment, which was in writing, was dated the 25th June 1873, and the material portions of it were as follows:—"To Jusab Hájí Jáfár on behalf of Memon Hájí Jáfár Wayodana, written by Memon Hájí Gul Muhammad Hájí Abda Rehmond. To wit. I give to you this bargain paper as follows:—There is your property consisting of houses two in numbers." Here followed a description of the houses, after which the agreement continued: "I have made this bargain paper to purchase the same from you for the value of Rs. 8,250. A^s earnest for the same I have paid to you in ready cash Rs. 1,000. As to the balance of Rs. 7,250, I am duly to pay the same to you on your signing a new deed of sale in respect of these two houses. * * * You are duly to deliver the new deed of sale in respect of these houses prepared through an Attorney. * * * The time for the performance of this bargain is fixed to be one month."

The agreement was not registered.

Latham, for the plaintiff (*Scoble*, A. G., with him,) at the hearing tendered the agreement in evidence.

Starling, for the defendant (*Purcell* with him), objected:—This, being an agreement to purchase, creates an equitable interest in immoveable property in the purchaser, and extinguishes one in the vendor. Therefore, the document is one which must be registered under Act VIII. of 1871, Section 17, clause 2.

Further, the document itself states the payment of Rs. 1,000; and, therefore, under clause 3 of the same section the document is one which must be registered. Under Section 49 of Act VIII. of 1871, the document cannot be received in evidence.

Latham:—The document is an agreement, and, therefore, the registration of it is optional under Section 18 of Act VIII. of 1871.

It creates no interest in immoveable property, for it is a contract, which affects only the person, not a conveyance,

which affects the property—Maine's Lectures on Ancient Law (a).

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He also cited on the question of the necessity for registration: *Ramtonoo Surmah Sircar v. Gour Chunder Surmah Sircar* (b); *Bunwaree Lal v. Sungum Lal* (c); *Mark Riddedd Currie v. S. V. Mutu Ramen Chetty* (d); *Bhairabnath Khettri v. Kishori Mohan Shaw* (e); *Haji Abdul Vidona Jonas v. Haji Harone Esmile* (f); and *Port Canning Land, Investment, Reclamations, and Dock Company (Limited) v. Smith* (g).

Fati Chand Sahu v. Lamber Sing Das (h), as being a sale *in presenti*, is distinguishable from the present case.

The words in clause 3 of Section 17 of Act VIII. of 1871 refer to the whole sum which is to be paid as the entire consideration, not to a small sum intended only to bind the bargain.

Starling, in reply:—The cases cited against our contention can all be distinguished, and even if they were applicable to the present instance, they have all been over-ruled by the case reported at 9 Beng. L. R. 433. There being no difference in equity between the sale and the agreement to sell, the agreement in this case, in the words used at p. 438 in the case last cited, "presently operates in equity as a sale of the property," even if the words used in the agreement, "I have made this bargain paper for the sale to you," be not held to be equivalent to the words "I have bargained and sold to you." In the case reported at 9 Beng. L. R. 433 the document is described as an *ikranama*, which means agreement (i). In that case, as in this, a further document was to be executed.

The words "any consideration" in clause 3 of Section 17 of Act VIII. of 1871 cannot be held to apply only to the whole

(a) Pp. 318, 321, *et seq.*

(b) 3 Calc. W. R. 64 Civ. Rul.

(c) 7 Calc. W. R. 280 Civ. Rul., also reported at 3 Wym. 186.

(d) 3 Beng. L. R. 126 A.C.J.

(e) 3 Beng. L. R. App. 1.

(f) 7 Beng. L. R. App. 21

(g) L. R. 1 Ind. Ap. 124.

(h) 14 Moore I. A. 129; S. C. 9 Beng. L. R. 433.

(i) He referred to Forbes's Hindustani Dictionary and Johnson's Arabic and Persian Dictionary.

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...it would be possible to give all documents from the necessity of registration by the payment of one pie less than the full consideration. Payment of a portion of the purchase money is a transaction affecting the property, and therefore Section 49 of Act VIII of 1871 applies.

The case reported at L. R. 1 Ind. Ap. 124 does not in fact conflict with that reported at 9 Beng. L. R. 439, and is no authority for the plaintiff's contention, for the document in that case did not create or extinguish any interest in immovable property, but was simply an agreement that when rent became due it should be set off against the debentures.

Cur. ad. vult.

SARGENT, J.:—This document is, on the face of it, termed a "bargain paper," and provides for the execution of "a deed of sale." It is, therefore, clear that the parties, at the time of the making of the agreement embodied in this document, contemplated the execution of a conveyance at some future date. I am, therefore, of opinion that this document does not need registration. That was the rule laid down in *Bunwaree Lal v. Sungum Lal* (j), where it was held that a deed merely preliminary to the main contract, such as this, need not be registered. In the case reported at 3 Beng. L. R. 127, the same argument was urged as in this case, viz., that equity treats as done what ought to be done, but Peacock, C.J., says (k): "It is not because a Court of Equity would treat a document as doing a thing which a party agrees to do, that the document comes within the meaning of an enactment which refers to a document by which a thing is done, and not to an agreement to do it." In this case, as in that, the document is merely an agreement to create such an interest as that contemplated by the Registration Act, but does not purport to create it. Nor does the document fall, I think, under Clause 3 of Section 17. The money paid in this case was earnest money for the performance of the agreement and not consideration money

(j) 7 Calc. W. R. 280 Civ. Rul.

(k) See p. 131.

for the creation of an interest in immoveable property. In the case reported at 14 Moore I. A. 179, the document was an instrument acknowledging the payment of the entire purchase-money. I must, therefore, rule that the document in this case is not one that needs registration, and is, therefore, admissible in evidence.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 278 of 1874.

June 9.

PANHA' KHUMAJI.....*Defendant and Appellant.*FATTA' UP'JI.....*Plaintiff and Respondent.*

Execution—Sale—Contest between two rival auction purchasers—Certificate of sale, Act VIII. of 1859, Section 259—Registration Act XX. of 1866, Sections 18 and 50.

Plaintiff and defendant were two auction purchasers. Plaintiff's purchase was prior, but his certificate of sale was not registered. Defendant's purchase was subsequent, but he was in possession, and his certificate was registered. Registration was optional in both cases. In a contest as to priority between plaintiff and defendant,

Held that under the provisions of Act XX. of 1866, Section 50, the defendant's title must prevail against that of the plaintiff.

THIS was a special appeal from the decision of W. H. Crowe, Assistant Judge at Tháná, reversing the decision of the Subordinate Judge of Penn.

The material facts in this suit, which was instituted by Futta Upaji against Panha Khumaji to recover certain immoveable property, are these:—The property in dispute originally belonged to one Posha Aba, and was, on the 11th November 1868, sold in execution of a decree against him and purchased by the plaintiff Futta Upaji. A certificate of sale was granted to him under Section 259 of the Civil Procedure Code, but was not registered by him. The property was again sold in execution of another decree against the said Posha, and was, on the 17th November 1869, purchased by the defendant Panha Khumaji, who took possession, and got his certificate of sale registered. Both the sales being for less than Rs. 100, registration was optional under Act XX.

1875. of 1866, Section 18. The Court of first instance dismissed the suit on the ground that defendant's claim was stronger than that of the plaintiff. In appeal, however, the Assistant Judge reversed that decree, and awarded the plaintiff claim on the ground that his purchase was prior to that of the defendant, and that, therefore, at the time of the sale to the latter, Posha Aba had no title left in the property sold.

The special appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA'S, JJ.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Shántarám Náráyan for the respondent.

KEMBALL, J. :—We must reverse the decree of the lower Court and restore that of the Court of first instance. We have a contest between two auction purchasers. The defendant, though his purchase was subsequent, is in possession, and his certificate of sale, which, under Section 259 of the Civil Procedure Code, is his title-deed, is registered. Whereas, the plaintiff, though his purchase was prior, failed to have his certificate registered. Registration was optional in both cases ; therefore, as each of the parties must depend on his certificate, it follows, under Section 50 of the Registration Act, that defendant's title must prevail. Decree of the lower Court reversed with costs on respondent.

[APPELLATE CIVIL JURISDICTION.]

June 14.

Special Appeal No. 263 of 1874.

VITHOBA' BIN CHABU (Original Plaintiff) ... *Appellant.*
GANGA'RA'M BIN BIRAMJI (Defendant No. 6) *Respondent.*

Mortgage—Redemption—Adverse possession—Limitation, Act XIV. of 1859, Section 1, Clause 15.

A mortgagor sued his mortgagee to redeem, joining as defendant the person in possession of the mortgaged land, who claimed to hold adversely to both the mortgagor and the mortgagee.

Held that the possession of the last defendant being a trespass, not on the possession of the mortgagor, who had only the equitable estate, but on the possession of the mortgagee, in whom the legal estate was vested, and the person in possession not pretending to be a *bonâ fide* purchaser from the mortgagee, he did not come within the exception in Section 5 of Act XIV. of 1859; that the trespasser could only succeed to such estate as the mortgagee possessed; and consequently that the limitation applicable to the suit as against him was sixty years, according to Section 1, Clause 15, of Act XIV. of 1859, the effect of which is not altered by any hostile possession commenced on a title independent of the mortgage.

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THIS was a special appeal from the decision of G. Druitt, Acting Assistant Judge of the District of Khandesh at Dhulia, reversing the decree of the Subordinate Judge of Jalgám in the same district.

The material facts of the case are briefly these:—The plaintiff alleged that in 1837 a piece of land was mortgaged to the ancestors of the first five defendants; that the sixth defendant was in possession of it; and prayed for redemption on payment of what might be found due. The first five defendants admitted the mortgage; the sixth denied all knowledge of it, and set up a title of his own irrespective of it.

The Court of first instance decreed redemption; that of appeal rejected the suit, holding it barred by the Limitation Act.

The special appeal was heard by KEMBALL and NA'NA'BHA'I HARIDA's, JJ.

Dhirajlál Mathurálús, Government Pleader, for the original plaintiff (special appellant).—The lower Appellate Court was wrong in holding the suit barred. Under Section 1, Clause 15, of Act XIV. of 1859 the plaintiff as mortgagor can sue to redeem within sixty years. The only exception to the rule enacted in the provision occurs in Section 5 in favour of *bonâ fide* purchasers for valuable consideration from mortgagees.

Ganesh Hari Patwardhan for the sixth defendant, the special respondent.—The plaintiff and the first five defendants have colluded together to defraud the sixth, who has been found to be in possession for more than twenty years.

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KEMBALL, J. :—This is a redemption suit. The first five defendants represent the original mortgagees, and the sixth is in present possession. Both the Courts below have found that the land in dispute was the property of the plaintiff, and that he mortgaged it as a security for the loan of certain monies in A.D. 1836. The Court of the Subordinate Judge further found that the five first defendants had leased the said land to the sixth, and decreed redemption on certain conditions; whereas the Assistant Judge held that there was not sufficient evidence of this letting, and he dismissed the suit with these observations :—"The land has been in his (defendant Gangarām's) possession considerably more than twenty years. His possession is adverse both to the mortgagor and to the mortgagees, and the claim seems to me to be barred. There is no privity whatever between him and the mortgagees. Certainly no suit could be maintained against him by the mortgagees, and I do not see how the mortgagor can have a better right than they. There is equally a want of privity between the mortgagor and defendant No. 6 as between the mortgagees and him. The mortgage, therefore, does not avail the plaintiff, and the suit is barred by the law of limitation."

The sole question raised in special appeal is, whether the Assistant Judge was right in thus holding the plaintiff's right to redeem, barred.

The case at first sight is not without its difficulties, but these disappear when we come to consider the position of the mortgagor and of the mortgagees in their respective relations to the sixth defendant, whom the Assistant Judge holds to have been in adverse possession throughout as against both. It may well be that a mortgagee, in whom the legal estate is vested, may lose, by lapse of time, his right to recover possession of his security as against a trespasser; but it is difficult to understand how there can be any trespass on the mortgagor's possession so long as he has only the equitable estate. A mortgagor is allowed a period of sixty years within which he may come in to redeem; and

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exception to this rule is made in favour of *bonâ fide* purchasers for valuable consideration from the mortgagee, where the term for redeeming is considerably abridged; but in all other cases it appears to us to make no difference how the hostile possession has commenced, whether through the fraudulent connivance, or through the neglect, of the mortgagee who is bound to preserve the property. The trespasser, as the sixth defendant has been found by the Assistant Judge to be, can only succeed to such estate as the mortgagee possessed, and we fail to see how the circumstance that the hostile possession is alleged to have commenced on a title independent of the mortgage, can alter the effect of Clause 15, Section 1, of Act XIV. of 1859, which is the law applicable to the case. We must, therefore, hold that the plaintiff was not barred from establishing his claim to redeem by reason of the so-called adverse possession of the sixth defendant; and we accordingly reverse the decree of the lower Appellate Court. We find, however, that the Court of first instance has decreed redemption on payment, to the first five defendants, of the mortgage money; but they have parted with their security. We must, therefore, amend his decree, and we direct that the plaintiff do pay to the defendant Ganga-râm the sum of Rs. 58-5-3 (found to be due) within six months of this date, and that the said defendant do, on payment of the said sum within the time prescribed, remove his hut and deliver possession of the land in dispute; and we further direct that, in the event of the plaintiff failing to pay the said sum, within the time specified, to the said defendant, he be for ever foreclosed. Costs of this appeal on the special respondent.

Decree accordingly.

[ORIGINAL CIVIL JURISDICTION.]

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Suit No. 371 B. of 1869.

M. A. DE SOUZA.....*Plaintiff*

IGNACIO FRANCISCO DE SOUZA and others*Defendants.*

Will—Trust—Executor—Investment—Shares—Conversion—Liability of an executor in Bombay to make good the loss occasioned to the estate by his neglect to convert the shares owned by his testator.

The rules and decisions of the Court of Chancery in England, relative to the duty of an executor to convert in the absence of any special direction to that effect in the will, do not, without great qualifications, apply in the High Court of Bombay, and the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in his administration of the estate.

Therefore, where the will of a Portuguese testator contained no special direction for conversion, nor any sufficient indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively *in specie*, so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to their testator, which subsequently became much depreciated in value,

Held that the executors were not liable for the loss so occasioned to the estate of the testator.

MANOEL de Souza, a Portuguese, died on the 2nd February 1862, having previously made his will, bearing date the 1st March 1860, by which instrument he appointed Antonio Domingo de Souza—his eldest son, one Francis Fernandes, and the first defendant Ignacio Francisco de Souza (his nephew), his executors. Francis Fernandes, one of the executors, died on the 20th May 1867, and the son, Antonio Domingo de Souza, on the 24th July 1867. This suit, for the administration of the trusts of the will, was then instituted by Manoel Antonio de Souza, the grandson of the testator and a legatee and devisee under the will, against the surviving executor and the legal representatives of the two deceased executors, with the object of making chargeable the surviving executor, Ignacio Francisco de Souza, and the estates of the deceased executors, Antonio Domingo de

Souza and Francis Fernandes, with certain alleged breaches of trust on the part of such executors in relation to their administration of the testator's estate.

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A reference was made to the Commissioner to take the accounts of the estate, and in the course of the investigation before him an account No. I, entitled "an account of the personal and moveable estate of the testator, Manoel de Souza, deceased, come to the hands of Antonio Domingo de Souza, deceased, late one of the executors of the said testator," was exhibited by the defendants Leopoldina de Gá, Francis Xavier Pereira, and Joseph de Silva, as the executrix and executors of the said Antonio Domingo de Souza. To this account the plaintiff filed a surcharge, claiming to be credited, in such account, against the estate of Antonio Domingo de Souza, with two sums, Rs. 4,092 and Rs. 36,046 respectively, the first being the value of 44 shares of the Chartered Mercantile Bank of the nominal value of Rs. 11,000 together with the premium, as of the 28th February 1863, at Rs. 93 per share (viz., Rs. 4,092), after deducting Rs. 11,000 admitted in the account, and the second being the value of 36 shares of the old Bank of Bombay, namely Rs. 36,000 (the nominal value of the shares) and premium as of the 28th February 1863 at Rs. 93 per share, but deducting Rs. 3,302 received in respect of such shares by the receiver in the suit. The Commissioner disallowed these two items of surcharge, and at the request of the plaintiff's solicitors certified such disallowance on the 23rd March 1875. The matter then came before the Court in the form of a motion on behalf of the plaintiff to reverse or vary the finding of the Commissioner on these two items as contained in his certificate.

Latham, for the plaintiff, in support of the motion.

Pigot, (with him *Farran*.) for the defendants, *contra*.

GREEN, J. :—It was contended on the part of the plaintiff's counsel that the Commissioner ought to have allowed these items of surcharge on the ground that, having regard to the provisions of the will of the testator and to the general rule of law applicable in this behalf, it was the duty of the exe-

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cutors of Manoel de Souza to have sold and converted the bank shares, which the testator held at the time of his death, within a reasonable period, say a year after such event, and, loss having, by such neglect and by reason of the depreciation in value of the shares so retained unconverted, occurred to the testator's estate, that the surviving executor and the estates of the deceased executors (amongst which was that of Antonio Domingo de Souza) were bound to make good such loss.

It will be desirable, in the first place, to state the provisions of the testator's will which have any possible bearing on the question at issue. After bequeathing divers pecuniary legacies and giving an annuity to a widowed daughter "to be paid by his executors out of the income of the residue of his property," the testator desires his executors to invest Rs. 10,000 in the purchase of Government promissory notes, and directs the income to be paid to a grand-daughter, Angela, for life, and after her decease to her children. The testator then devises certain specified immoveable estate to sons and grandsons, charging certain portions of it for certain religious or charitable purposes. The only portion of these clauses, relating to his real estate, which may possibly be material, is contained in the clause enabling his trustees, in the case of the minority of any of the devisees, to apply such part of the net balance of rents and profits as the trustees think proper for the maintenance and advancement of such minor, and "to accumulate the residue of the said rents and profits in the way of compound interest by investing the same and all the resulting income thereof in the names or name of the said trustees or trustee, with power to vary the same at their or his discretion," &c. The testator then bequeaths to his trustees "the sum of Rs. 20,000 invested in Government promissory notes" upon certain trusts for two of his grandsons and their children. He then bequeaths to his trustees "the further sum of Rs. 10,000, invested in like Government promissory notes," upon certain trusts for the benefit of certain great-grandsons and their children, and "the further sum of Rs. 10,000 in like Gov-

ernment promissory notes " upon certain trusts for the children of another grandson. The will then proceeds: " And as to all the residue of my property after payment of the legacies hereby bequeathed, my just debts, funeral and testamentary expenses, I give, devise, and bequeath the same unto the said Antonio Domingo de Souza, Francisco Fernandes, and Ignacio Francisco de Souza, their heirs, executors, and administrators, upon the following trusts, that is to say, upon trust that my said son, Antonio Domingo, shall be permitted to receive the income thereof for his life, and, after his decease, upon trust to pay the said income to my said grandson, Manoel Antonio de Souza (*i.e.*, the plaintiff), for his life, and, after his decease, upon trust to hold the said residue and the annual income thereof for all the sons or any the son of the said Manoel Antonio de Souza who shall survive him and attain 21 years, and, if more than one, in equal shares." Then follow provisions for the case of default of issue of Manoel Antonio.

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The will, in providing for the minority of persons taking under the residuary disposition, (amongst other things) provides that the trustees should, in the case therein mentioned of the minority of a devisee, accumulate the residue of the annual income (after providing for maintenance, &c.) of the share or interest of such minor " by investing the same and the resulting income thereof from time to time in or upon any such investments as are hereinbefore mentioned." The will, in giving express powers to the executors with reference to getting in, satisfying, compromising, and taking security for, any debts or liabilities of the estate, gives them authority " generally to act in regard thereto as they shall think expedient without being responsible for any loss thereby occasioned." Then follows a clause making the receipt of the acting trustees or trustee a good discharge " for the purchase money of promises sold or for any moneys, funds, shares or securities which may be paid or transferred to them or him in pursuance hereof of any of the trusts hereof." The will concludes with clauses providing for the appointment of new trustees.

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Though not providing for any investment of the residue generally, the testator does, as we have seen, provide for the investment of accumulations in the case of minors taking under the residuary disposition "in or upon any such investments as are hereinbefore mentioned," though what this may refer to, is by no means clear. The only investment specifically mentioned is Government promissory notes; though the testator had, according to the construction which I put on his will in a previous clause, authorized the investment of accumulations of rents and income of real estate specifically devised "at the discretion of the trustees or trustee". Lastly, in the receipt clause, it will have been observed, the testator seems to have contemplated the *acquisition* by the trustees of something more than Government promissory notes, as he provides that their receipt shall be a discharge for (*inter alia*) "moneys, funds, shares, or securities" paid or transferred to the trustees, though nowhere do the trusts of the will *expressly* authorize the transfer to the trustees of shares.

It will be seen that the will contains no directions as to the kind of securities in which the residue of the testator's property is to be invested, nor, indeed, except in a particular state of circumstances, any direction at all for its investment. In fact, the only express direction as to the kind of investment is the one in the early part of the will with relation to the Rs. 10,000 bequeathed to his grand-daughter Angela. The gifts, in a subsequent part of the will, of Rs. 20,000, Rs. 10,000, and Rs. 10,000 for certain of his grandsons and great-grandsons are, it will have been observed, not of sums to be invested in Government securities, but of sums apparently already invested and held by the testator in such securities. The power to invest the accumulations of income of real estate, in case of the minority of a devisee, is very general, and the words "at their or his discretion", in my opinion, refer as much to the first investment of such accumulation as to the subsequent varying of such investments when made. This construction seems to me to follow from the consideration that otherwise (that is to say, if the

trustees were restricted to one form of investment, viz., Government promissory notes) what effect could be given to the words to vary such investment, when there is only one investment which can be resorted to? The gift of the residue of the testator's property to the trustees, it will have been observed, is unaccompanied by any direction or power to invest the same; the first trust on which it is to be held, is that his son, Antonio Domingo, shall be permitted to receive the income *thereof*.

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In the English Chancery there are several rules relative to the matter now under consideration which have been established by a course of decisions. These rules have, however, to a certain extent been modified by a recent statute, as will be hereafter mentioned. Unless the residue of the estate of a testator, after satisfying debts, can be at once distributed to the objects intended to take beneficially, it is the duty of the executor or trustee of the will to invest such residue on some proper security so as to yield income. In cases where the residue is given for life, with remainders over, it is further his duty, in the absence of special provisions, to see that the funds be not only properly invested as to security, but also that the securities be of a permanent and not perishable or terminable nature, so that those in remainder may, as nearly as possible, have an equal benefit, in respect of income, as those in immediate enjoyment. Where any particular securities or class of securities are indicated by the creator of the trust as the mode of investment intended by him, the executor or trustee will not be justified in going beyond such mode of investment from any belief, well founded or otherwise, of thereby benefiting the *cestuis que trustent*. In the absence of any power expressly given by the will, it is the general duty of an executor to adopt, as the mode of investment, one of the Government or bank annuities as answering best the requisites of security and permanence, and the proper one to select is that in which the Court itself has been in the practice of making the investment of the monies of suitors, viz., the 3 per cent.

1875. consolidated bank annuities. If property is found, at the death of the testator, in a state of investment other than Government 3 per cent. consolidated annuities and not corresponding with that authorized by any express provision of the will, the executor or trustee, within a reasonable time, is bound to convert it and place it in the state authorized. If no special mode of investment is expressly authorized, it is the general duty of the executor or trustee, by investment of such property as is not invested at all and by sale and conversion of such as is already invested, to place the estate in such state of investment as the Court, as general trustee, would place it, i.e., in 3 per cent. consolidated annuities; and the period from the testator's death, within which the Court, by a rule of convenience, considers the conversion may and ought in general to be made, is twelve months. When, however, a residue is given to several in succession in such terms as to indicate that the testator intended that they should successively enjoy the income of the property in specie and as it was at the testator's death, then the duty of conversion into 3 per cent. ceases, and the executor or trustee may, and is in fact bound to, retain the property, or such portion of it as was in fact invested in the state of investment it happened to be at the testator's death, and this whether or not such state of investment was such as, in other circumstances, would have been considered secure and permanent. An executor or trustee, investing any portion of the estate in a way not authorized by the will and not being a way which the Court itself is in the habit of adopting for its investments, is held liable to make good to the *cestui que trust* any loss occasioned by such breach of duty. Further, where an executor or trustee is expressly directed to convert the estate either immediately or within a reasonable time, and he retains investments, made by the testator, without reasonable excuse, he will be charged, in case of loss or depreciation, with the amount which such investment would have produced if disposed of at the time when the Court, in the particular case, deems that the conversion ought to have been made. These rules and principles are amply illustrat-

ed by the cases of *Howe v. the Earl of Dartmouth* (a) and *Brice v. Stokes*, (b) and the notes to those cases in Vol. II. of White and Tudor's Leading Cases in Equity. I do not find, however, among the cases there cited, any case, and the learned counsel for the plaintiff admitted that he had not been able to find one, where, in the absence of an express direction in the will to convert, an executor or trustee had been held personally liable to make good the loss occasioned by the mere retention of an investment held by the testator at the time of his death. The question, however, has arisen and been discussed in several of the cases, and the duty of the executor or trustee to convert in that case also has been laid down, but in those cases it was not sought to fix the executor or trustee with personal liability, but rather to apportion the benefits which had arisen from non-conversion as between those entitled for life and those in remainder, as if such conversion had taken place. Though the present case, which is one of seeking to make the estate of Antonio Domingo de Souza immediately liable for a neglect or omission to convert the shares in the old Bank of Bombay and the Chartered Mercantile Bank, may not be exactly covered by any actual decision, I cannot but be of the opinion that, had the case arisen in the English Court of Chancery, Antonio Domingo de Souza would not have been held justified in retaining, as he did, these shares from 1862 down to the time, at least, of his own death in 1867. I say Antonio Domingo de Souza, and not the executors generally, as the question here immediately arises with reference to a surcharge on the estate of Antonio Domingo de Souza, and I have no materials before me to form any opinion, and do not express any, as to any question of liability of the first defendant and the estate of Francisco Fernandes for this matter. I may here mention also that I must treat this case on the footing that there is no sufficient indication of intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively in specie, so as to exempt the executors, on this ground, from the duty of

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(a) 7 Ves. 137; see p. 151.

(b) 11 Ves. 319.

1875. conversion. I think the case of *Thornton v. Ellis* (c), and not
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But it has been argued that, whatever may be the rule or whatever would have been the decision of this case in the Court of Chancery in England, there is no instance to be found of the application of such rule in the Indian Presidency Courts as is here sought to be applied in charging the estate of the executor. There are further, in my opinion, certain considerations which appear to me sufficient to make this Court hesitate, for the first time, to apply the principle sought to be enforced here. Had there been any express trust or direction in this will to convert the residue and invest it in any particular way, there would, of course, have been little difficulty in the case. Though the executors would, in that case, have been allowed a reasonable time and a certain period of delay within which, in the exercise of their discretion, to proceed in the operation of conversion, yet I am of opinion that, with the express directions of the testator to guide the executors, a delay of four or five years would not have been excusable. But here we have a case of absence of any trust or direction to convert and invest the residue; and the fact of the absence of such trust or direction, in relation to the residue, may be considered to have some additional importance from the fact that, in respect to one particular legacy, that of Rs. 10,000 to his granddaughter Angela, the testator *does* give directions as to investment in Government promissory notes.

The considerations, however, which I have mentioned as making me hesitating in applying to the present case what probably would have been the rule applied, had this been dealt with by the Court of Chancery in England, are the following :—The practice of the last-mentioned Court in investing the monies of suitors in its hands in 3 per cent. consolidated bank annuities has been treated by that Court as furnishing a rule or example by which trustees and executors should, in the absence of special directions by the creator of the trust, govern their conduct in respect to the

(c) 15 BOMV. 193.

(d) 28 BOMV. 436.

investment of the trust estate. It must, however, be remembered that the practice of the Court in making such investment had been long established before the rule was established, or at least in force; and the fact, that such practice had been long established and notorious, was treated as the ground for imposing on executors and trustees, in the absence of special provisions in the instrument appointing them, the obligation of pursuing a like course. The rule itself, however, was of gradual growth, though it may be considered to have been established in England for upwards of a century. Had the circumstances of India been the same in respect of this matter as those of England, I should not have felt the difficulty I do in applying the rule of English Equity Courts to this matter, even though no reported precedent may be producible of its application by the Supreme or High Courts of India. Though, no doubt, there have been public securities, which may be treated as Government securities, in existence in India for a very considerable period, (I do not here, of course, refer to the capital stock of the East India Company,) they have, to by far the larger extent, been the creation of the present century and in fact of the last twenty-five years. In conjunction with this I do not find that it has been, by any means, the uniform practice of the principal Court of original jurisdiction in Bombay to invest the monies of suitors in such funds. From some official correspondence, with which the Acting Accountant General, Mr. Gordon, has obligingly furnished me, I find that previously to 1814 the Recorder's Court used to deposit suitors' monies in the Government Treasury, the Government allowing interest on such deposit. In 1814 the system was altered by reason of the Government declining any longer to allow interest on such deposits. Then for some years the practice appears to have existed of the Recorder's Court directing the Accountant General to invest such deposits in Government securities, but *still oftener* to lend them out, at interest at a variety of rates, to individuals on the security of Company's papers deposited with him. In 1820 the former system was revert-

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1875. ed to, of the Government receiving such monies as deposits in their Treasury and allowing interest at 4 per cent. This system received express recognition by the charter of the 8th December 1823, establishing the late Supreme Court. By one of the later clauses of this charter it is provided that all monies, securities, and effects of the suitors, paid into Court, are to be paid to or deposited with the Governor or President in Council at Bombay to be by them kept and deposited with the cash and effects of the Company, and power is given to the Court of Directors to appoint an Accountant General of the Court to execute and carry into execution the orders of the Court relating to the payment and delivery of suitors' money, effects, and securities, and taking them out again, and keeping the accounts with the Governor and Council and Registrar of the Supreme Court. The correspondence, which I have mentioned, shows that this system of deposit at interest in the Government Treasury was in existence in 1837, and, so far as I can learn by inquiry, was in existence down to a much later period, and, so far as I can discover, is the only specific mode which has ever been sanctioned by any provision of a charter or Act of the Legislature, or general rule of Court, for the investment of the monies of suitors in the hands of the Court. I say a *general* rule of Court, as there is no doubt that, for a considerable period (the commencement of which, however, I have not been able to discover), it has been the practice of the Court, by its decrees and orders in each particular suit, to direct the Accountant General to invest funds, paid in to the credit of such suit, in promissory notes of the Government of India. .

The rules of the Supreme Court are, it appears, quite silent on this head. The Indian Succession Act of 1865 (which, however, would not be applicable to this will) contains provisions, Sections 301-307, with regard to the duty of an executor as to investment. The language of these sections seems to me rather to imply that, at the time of passing the Act in 1865, the High Courts had not, in

fact, by any general rule, indicated any securities as the proper ones for investment by executors; and I am not aware that the High Court of Bombay has, ever since that time, by any general rule, given any authority or direction with regard to class of permissible investments. I consider, therefore, that the statement is supported by the facts that down to the present day the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in his administration of the estate. I say accessible to a private executor or trustee for the reason that, though a deposit at interest in the Government Treasury may be said to be equivalent, in regard to security, to investment in promissory notes of the Government of India, yet it has not been a mode of investment available for an individual trustee or executor in the absence of a suit in Court, and, on this account, such individual trustee or executor could not, if he would, as in England, take as his example the practice of the Court. It is also to be observed that, at the time of the testator Manoel de Souza's death in 1862, the rule in England had been considerably modified by Section 32 of 22 and 23 Vic., c. 35, and the section was made retrospective by Act 23 and 24 Vic., c. 38, s. 12. By this provision, trustees and executors may, in the absence of express *prohibition* in the instrument of trust, invest trust funds in, amongst other things, stock of the Bank of London or Ireland or in East India stock. By this provision the principle of requiring trustees and executors to invest in Government securities was departed from, for it may be observed that stock of the Bank of England or Ireland are no more Government securities than were shares in the old Bank of Bombay.

I am not, in the present case, in any way pressed by the consideration of the necessity of providing a rule for the future guidance of executors, as that object will be attained so soon as the High Court may exercise the powers, conferred upon it by Sections 301-307 of the Indian Succession

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1875. Act, of making general rules which will be a guide to executors in this matter, and I intend to call the attention of the Chief Justice and my colleagues to the necessity, as shown by the present case, of at once framing such rules.

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For the foregoing reasons, and chiefly having regard to the fact that the circumstances, by reason of which the rules in question have been imposed on executors and trustees in England, have not existed in India, I feel so much difficulty in the absence of any precedent, in declaring them applicable in the present case, that I must refuse the motion to vary the Commissioner's certificate, and do confirm the same. It is not, in my opinion, a proper case to make an order as to costs of the motion, except that the parties respectively do bear their own.

[APPELLATE CIVIL JURISDICTION.]

July 8.

Application under Extraordinary Jurisdiction.

VARAJLA'L SHIVLA'L... (*Original Plaintiff*) Applicant.

DAISUKH VARAJLA'L... (*Original Defendant*) Opponent.

Contract—Consideration—Compromise.

When a claim is once compromised, and a new contract entered into, the promisor is estopped from pleading illegality or absence of consideration for the new contract, the real consideration for it being the withdrawal of the claim itself, irrespective of the possibility of its being prosecuted to a successful issue. The new contract can only be questioned on the ground of fraud, such as want of good faith in making the claim compromised.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction. The plaintiff's claim was rejected by the Subordinate Judge of Kapadwanj, and on appeal to the District Judge this decree was confirmed.

The application was heard by KEMBALL and LARPENT, JJ.

Nagindás Tulsidás for the applicant.

Gokaldás Kshándás for the opponent.

The facts fully appear from the following judgment of the Court delivered by

KEMBALL, J. :—This is an application for the exercise of the Court's extraordinary jurisdiction, there being no special appeal, as the amount of the suit was less than Rs. 500.

The facts are short and simple, though the question submitted for our consideration is one of some importance.

The plaintiff in the present suit, it appears, brought an action, in 1867, on the original side of the High Court, to recover, from the present defendant, moneys alleged to have been paid for him at his request. Subsequent to the institution of the action a compromise was entered into between the parties, the defendant promising, in consideration of the withdrawal of the claim from Court, to pay to the plaintiff a sum of Rs. 901 by instalments. Certain of these instalments having remained unpaid in 1873, the plaintiff brought this action to recover the amount due with interest. The defendant, in answer, admitted execution of the deed of compromise, but objected that the consideration was not legal, as the deed passed was for sums supposed to have been paid to persons in Bombay on *sallá* or gambling transactions, that he did not know whether the sums had really been paid, and that if he must pay, he could not pay the whole at once. The Subordinate Judge rejected the claim, holding that the deed sued on evidenced a contract by way of security for the performance of wagering agreements, and could not be enforced under Bombay Act III. of 1865, presuming this from the fact of the plaintiff having failed, without satisfactory excuse, to produce his account books called for at the instance of the defendant. In appeal, however, the District Judge held that, as the transactions, which were the foundation of the action in the High Court, were ended before the passing of Act III. of 1865, they "were at that time such as to give rise to a legal consideration, although the bond was not passed until 1867;" but he added "But there is another ground on which, I think, the decree may be upheld. The defendant, while admitting the deed, pleaded that he did not know whether the plaintiff had made the payments which constituted the consideration; and one of the issues laid

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1875. down by the Subordinate Judge, was whether consideration had been paid. The defendant, as he questioned it, was bound to show that it had not. He called for the accounts of the plaintiff; but it was answered that they had been produced in the High Court, and since that time the plaintiff did not know what had become of them. I agree with the Subordinate Judge in thinking this a very unsatisfactory answer. Entire account books do not get mislaid as a single document might, and the defendant was deprived of the principal means of making good his plea by their non-production, and this is, I consider, a sufficient reason for rejecting the claim under Section 170 of the Civil Procedure Code." And further on: "The bond was, it is true, passed after a suit had been filed in Court; but the Subordinate Judge rightly remarks that there is no proof that the suit was one which would have succeeded, as a defendant might be intimidated into passing a compromise bond by the fear of expense and trouble and the chances of law."

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Both the lower Courts, it will thus be seen, have based their rejection of the plaintiff's claim on his failure to produce his books, each presuming therefrom that he had no claim which he could have prosecuted by legal proceedings to a successful issue. The Courts below, however, appear to us to have mistaken the point in the case, namely, the real consideration for the defendant's promise, and the plaintiff has thereby been seriously prejudiced. Assuming that the plaintiff would have been defeated had he prosecuted his original claim, that in itself would not, as observed by Cockburn, C.J., in *Callisher v. Bischoffshelm* (a), "vitate the contract and destroy the validity of what is alleged as the consideration." It was held in that case as settled law that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration, one of the authorities referred to being the case of *Cook v. Wright* (b), where the question is fully discussed. It was not contended in the present case, in the Courts below,

(a) L. R. 5 Q. B. 449. (b) 30 L. J. Q. B. 321, S. C. 1 B. and S. 559.

that the plaintiff knew that he had no real claim against the defendant when he brought his action in the High Court (a very different plea to that relied on by the District Judge). We must, therefore, assume that his claim was honest, and that the compromise was made *bonâ fide*. The agreement was a perfectly reasonable one; the plaintiff consented to forbear prosecuting what he considered to be a good claim, and the defendant obtained the advantage of escaping from the annoyances attending a law-suit. The plaintiff's forbearance to continue his suit constituted a good consideration; in the absence, then, of any allegation, in the written statement, that the plaintiff did not *bonâ fide* believe, in his first suit, that he had a fair chance of success,—in other words, that his claim was fraudulent,—it was immaterial in the suit now before us whether that claim was good or bad. Therefore, assuming that the plaintiff did contumaciously refuse to give evidence—a point on which we express no opinion—it was clearly not on a material fact in the case, and we must hold that it was a wrong exercise of the discretion given to Courts under Section 170 of the Code of Civil Procedure to reject on that ground the plaintiff's claim. We, accordingly, reverse the decrees of the lower Courts, and award the claim in full with costs throughout on the respondent.

Decree reversed and claim awarded.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 348 of 1875.

July 19.

HORMASJI KARSETJI and others Plaintiffs.

W. G. PEDDER, Municipal Commissioner, } Defendants.
and another }

Injunction—Bombay Act III. of 1872—Town duty—"Spirits"—Toddy.

Quære—Whether the Court ought to interfere by way of injunction with the exercise of a right, or alleged right, of officers of a municipal body to levy taxes and dues.

Toddy-juice, whether in a fermented or unfermented state, is not "spirits" within the meaning of Bombay Act III. of 1872, and is, therefore, not liable.

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on importation into Bombay, to a town duty of As. 4 per gallon imposed on spirits by Schedule B of that Act.

THE plaintiffs instituted a suit against the defendants, as Municipal Commissioner and Acting Municipal Commissioner of Bombay, for the recovery of damages sustained by the plaintiffs by reason of the defendants having levied a town duty of As. 4 per gallon on the plaintiffs' toddy-juice imported into Bombay from Bhándup.

Farran, on behalf of the plaintiffs, on the 13th July 1875 obtained a rule *nisi* calling on the defendants to show cause why they should not be restrained from levying such duty.

The rule came on for argument before GREEN, J., on the 15th July 1875, when

Inverarity on behalf of the defendants showed cause. Toddy is commonly known as "spirits", and is so described in Regulation XXI. of 1827, Section 54, Clause 2. The preamble of that regulation shows that one of its objects was to prevent intoxication amongst the people. Our affidavits show the intoxicating properties of fermented toddy, that fermentation has almost invariably set in before the pots are removed from the trees, and that, on the fermentation setting in, the toddy immediately acquires intoxicating properties. Toddy, therefore, being known as spirits, and adapted for the purposes of intoxication, must be considered to be spirits within the meaning of Bombay Act III. of 1872, and, consequently, the town duty has been rightly levied on it.

Jardine in support of the rule.—Regulation XXI. of 1827, Section 54, is not embodied in the Bombay Municipal Act, and the definition of toddy as a spirit in the Regulation is for the purposes of the Regulation only. The care with which in that Regulation and in Act XVIII. of 1853, Section 15, toddy is specially included among spirits, shows that in the ordinary acceptation of the term toddy is not a spirit. The two properties of being fermented and being intoxicating, do not of themselves constitute toddy a spirit; otherwise beer would be a spirit; but a duty distinct from that on spirits is

specially imposed on beer by Schedule B of Bombay Act III. of 1872. There being no definition of spirits in that Act, the ordinary definition must be accepted, viz. "an inflammable liquid produced by the process of distillation." The Act, imposing a duty on the subject, must be construed strictly against the Government. A duty of As. 4 per gallon on toddy would be prohibitive.

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On the 19th July 1875 the following judgment was delivered by

GREEN, J. :—By Section 114 of the Bombay Municipal Act III. of 1872 it is enacted, "Duties at the rates specified in the Schedule B, annexed to this Act, shall be leviable in respect of the several articles therein specified when imported from any place into the city of Bombay. The said duties shall be called Town Duties, and shall be leviable in addition to any Customs duties prescribed by law." In Schedule B are contained, amongst others, the following articles :—"Wines and spirits, rate per gallon 4 annas"; "Beer, rate per gallon 6 pies."

The plaintiffs are the administrators of one Karsetji Kávasji Ashburner, and the defendants are, respectively, the Municipal Commissioner and Acting Municipal Commissioner for the city of Bombay. The plaintiffs claim, as administrators of the said Karsetji Kávasji, to be owners of certain lands in the villages of Bhándup, Navur, and Conjurám, in the island of Salsette, under a grant to their predecessor in title by the President and Governor in Council of Bombay, under date the 7th September 1803. By one of the articles of this grant, after reciting that the Hon'ble Company had exercised, and then exercised, the right of taxing certain brab trees growing on the lands so granted, it was agreed on the part of the Company to relinquish all property in the brab and other trees situate on any part of the said lands in favour of the grantee, his heirs, executors, administrators, and assigns. The plaint alleges that the deceased Karsetji Kávasji (and, as appears from the grant of letters of administration to the plaintiffs, his decease took place on the 9th February 1875)

1875. had, previously to the month of November 1874, been in the habit of causing the juice called toddy to be drawn from the brab and wild date trees (amounting to many thousands in number) growing on the said lands, and bringing the same to a distillery at Bhándup and therein distilling from such juice a spirit called "arrack". That in October 1874 the deceased, Karsetji Kávasji, ceased to distil spirits from the said toddy, and under an agreement entered into with one Edulji Hormasji and one Pestonji Nánábhoy, of Bombay, began to import a considerable portion of the toddy drawn from his said trees in its natural unfermented state into the city of Bombay; but the said toddy was for that purpose put into casks, which were conveyed from Bhándup to Bombay by the G. I. P. Railway, and that a large quantity of such toddy was thus imported by the said Karsetji Kávasji into Bombay in the months of November and December 1874 and during the early portion of the month of January 1875. On the 2nd February 1875, the plaintiffs further allege, the Railway Company refused to deliver to the consignees at Bombay certain casks of unfermented toddy which had been sent by the said Karsetji Kávasji from Bhándup to Bombay, except on payment of town duty at 4 annas a gallon; that in so refusing the officers of the Railway Company stated they were acting at the instance and under the orders of the Municipal Commissioner, who had classed toddy-juice, for the purpose of levying duty on it, with other country liquors. The plaintiffs further allege that, since the death of the said Karsetji Kávasji, and on the 19th April 1875, they caused another cask of toddy-juice to be sent by the railway from Bhándup to Bombay, but that delivery was refused, except on payment of a town duty of 4 annas per gallon. From the correspondence annexed to the plaint it appears that the first defendant, the Municipal Commissioner, and his successor or *locum tenens*, the Acting Commissioner, contend that, under Section 114 of the Bombay Municipal Act 1872, and Schedule B to the same Act, they are entitled to levy 4 annas per gallon as town duty on toddy-juice imported into Bombay as being "spirits". The

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plaint prays (amongst other things) that the plaintiffs may be declared entitled to import toddy drawn from the trees upon the said estate at Bhándup into the city of Bombay without being subjected by the defendants to the payment of town duty upon the same, and that the defendants, their servants, and agents, may be restrained by injunction, from levying town duty upon the toddy imported by the plaintiffs into the city of Bombay from the said estate at Bhándup. On the 13th July, instant, a rule was granted by this Court calling upon the defendants to show cause why they, their servants and agents, should not be restrained by injunction from levying town duty upon the toddy imported by the plaintiffs into the city of Bombay from the estate at Bhándup in the plaint mentioned. On the 15th July, instant, the said rule came on to be argued.

Had any objection been made by the defendants on the point, I should, as at present advised, have had considerable difficulty in holding that such a case as the present is a proper, or perhaps even an admissible, case for the Court to interfere in by way of injunction. I have not been able to find any precedent for a Court of Equity issuing an injunction against officers of Government exercising a right, or alleged right, of levying taxes or rates. The *dicta* in the cases of *Ellis v. Earl Grey* (a), *Rankin v. Huskisson* (b), *Hill v. Reardon* (c), and *Felkin v. Lord Herbert* (d), furnish examples of the cases with their limitations in which the Court interferes by injunction against officers of Government. On the other hand, the Anon. case in 2 Ves. 620, and *Attorney-General v. The Mayor of Lichfield*, (e), seem to show that a Court of Equity has jurisdiction by way of injunction over a municipal authority to a certain extent with regard to the levy of rates. However this may be, no objection was made on this ground on the part of the defendants in showing cause against the rule. It is very possible that they are content to have the matter determined in as speedy and simple a manner as possible, and the question here is in itself one that may be

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(a) 6 Sim. 214. (b) 4 Sim. 13. (c) Jac. 84, S. C. 2 Russ. 608.

(d) 30 L. J. Ch. 604. (e) 11 Beav. 120.

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as well decided on a motion for an injunction as in a suit grounded on a claim for money had and received, or what in England might have taken the form of an action of replevin. Assuming, however, that this Court has jurisdiction to interfere by way of injunction in such a case as the present, the simple question is, has the Municipal Commissioner a right to levy a town duty on toddy-juice imported into Bombay as being "spirits"? The affidavits filed on behalf of the defendants are mainly directed to show that fermentation takes place in toddy-juice at a very much earlier point of time after it has been drawn from the tree than the affidavit filed on behalf of the plaintiffs allow, and that, so soon as the process of fermentation has commenced, toddy-juice begins to have intoxicating properties. This evidence is intended, I presume, to show that, having regard to the necessary lapse of time occupied in collecting the juice from the trees at Bhándup, in putting it into casks and in the transit of the casks to Bombay, the toddy-juice when it arrives at Bombay must be in a considerably advanced stage of fermentation, and so becomes an intoxicating liquor. In the affidavits of Dr. Weir, Health Officer of the Municipality) and Mr. Wilson (Analytical Chemist); filed on behalf of the defendants, I find it stated that toddy-juice, completely fermented, would contain from 5 to 8 per cent. of pure spirit. The argument of the defendants, on this part of the case, seems to be that, because this toddy-juice when it arrives in Bombay, say, at least, four or five hours after it has been drawn from the trees near Bhándup, must be in a considerably advanced stage of fermentation and possess intoxicating properties, therefore it is spirit. I do not follow this argument. Wine and beer are both fermented liquors and intoxicating, and yet are not spirits. It is quite clear to me that to constitute "spirits" something beyond fermentation and the possession of intoxicating properties must be found. Regulation XXI. of 1827, Chapter XI., intituled "Rules under which spirituous liquors are allowed to be manufactured at stations subordinate to the Presidency of Bombay and duties to be levied thereon," has been relied on by the defendants as showing that spirits ought to be held to include

toddy-juice. In Clause 2 of Section LIV. it is provided: "The term 'spirit' or 'spirituous liquor' is to be understood to include toddy in a fermented state." So, again, by Section 15 of Act XVIII. of 1853, intituled "An Act for regulating the sale of spirituous liquors, &c., in cantonments," and which recites that "it is expedient to regulate the sale of spirituous liquors, wine, and intoxicating drugs within military cantonments," it is provided that in the construction of that Act "the words 'spirituous liquor' shall include toddy in a state of fermentation or after it has been fermented." But the very fact of it being considered necessary expressly to provide that for the purposes of those enactments (which are very different to the purpose of the Bombay Municipal Act of 1872 in authorising the levy of town duties) spirit or spirituous liquor shall include fermented toddy-juice, seems to me rather to show that *ex vi termini* and in common parlance toddy-juice even when fermented is not "spirits". Beyond this it does not seem to me that Regulation XXI. of 1827, Chapter XI., has any bearing on the present case, as the question here is whether a town duty can be imposed on imported toddy-juice under Bombay Act III. of 1872, as being spirits when the Act contains no provision that spirits shall be deemed to include toddy. Now, unless it is quite clear that of itself and in common parlance (for, as I have mentioned, we have no assistance here from an interpretation clause) the word "spirits" includes toddy-juice, the levy of a town duty on toddy-juice under the Municipal Act is an unauthorised levy. Courts of Justice, before they construe legislative enactments as imposing any tax, due, rate, toll, or other burthen on the subject, require, according to the well-settled rule applicable in such cases, that the intention of the Legislature should be expressed in clear, unambiguous language. "*In dubio*," says Lord Brougham, in the *Stockton and Darlington Railway Company v. Barret* (1), "you are always to lean against the construction which imposes a burthen on the subject." The meaning of the Legislature to tax him must be "clear". In the present case, however, I cannot

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1875. say that I feel even a doubt that the word "spirits" in the Act in question ought not to be held to include toddy-juice, whether partly or completely fermented. In the case of the *HORMASJI KARSETJI v. W.G. PEDDER. Attorney-General v. Bailey (g)* (brought to the attention of the Court by the learned counsel for the defendants, more I should suppose for the purpose of attempting to avoid the effect of it than as being an authority in his favour) the Court of Exchequer in England had to consider the meaning of the word "spirits" in the English Excise Acts. There, as here, there was the absence of any statutable definition of the word, and the Court had to assume that it was used in those Acts in the sense in which it was ordinarily understood. The point for decision was whether under those Acts "sweet spirits of nitre" (which, it is to be observed, was stated to contain no less than 80 per cent. of uncombined spirits) was to be included in the word "spirits", and the Court decided that it was not. Rolfe, B., in delivering the judgment of the Court, says: "And we think that nothing can be taken to be 'spirits' within the meaning of the 6 Geo. IV., C. 80", (and he had before stated that he assumed the word to be used in that Act in the sense ordinarily understood,) "which does not come under the definition of an inflammable liquid produced by distillation, either pure, or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the genuine appellation of spirits." It is, I think, essential to the definition of spirits that it be something produced by distillation, *i.e.*, liquid produced drop by drop from vapour. As a point of etymology it is, I think, pretty clear that it was only by reason of such very material substances as brandy, rum, and gin, or rather their essential element, having once existed in a state of vapour, that they came to be designated by a name in itself so inappropriate as "spirits". That "spirits" is a word properly and in common parlance applicable only to a liquid produced by distillation, is illustrated by the following description in McCulloch's Commercial Dictionary:— "All inflammable liquors obtained by distillation, as

brandy, rum, geneva, whisky, gin, &c., are comprised under this designation," i.e., of spirits. So in Smith's Wealth of Nations, B. V., Ch. 2, we find this passage—" Fermented liquors brewed, and spirituous liquors distilled, not for sale, but for private use, are not, in Great Britain, liable to any duties of excise."

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For these reasons I am of opinion that toddy-juice—though, when fermented, it contains a small quantity of alcohol (from 5 to 8 per cent.)—cannot be held to be included under the term "spirits". No doubt, fermented toddy-juice, when subjected to distillation, will produce spirits or alcohol. But alcohol or spirit may be obtained by distillation from many other matters not only fermented liquids, such as beer and wine, but also from molasses, beet root, apples, and wood. But these substances because they can be made to produce "spirits" are not themselves "spirits".

Having, therefore, no other guide to the meaning of the word "spirits" as used in Schedule B, than the consideration of its ordinary meaning within which, in my opinion, toddy-juice does not come, the conclusion at which I have arrived is that toddy-juice, whether unfermented or fermented, is not within Schedule B of the Municipal Act, and that on importation into the city of Bombay it is not liable to town duty. I may add that it is very improbable that the Legislature could ever have intended by the Act in question to impose a duty of 4 annas a gallon on toddy-juice imported into Bombay. The object of imposing town duties was to gain a revenue for the Municipality, not to prohibit the import of toddy-juice. Having regard, however, to the fact that the outside retail selling price of toddy-juice in the island of Bombay is little, if at all, over 8 annas a gallon, it is evident that to exact 4 annas a gallon town duty on its import into the island, so far from yielding any revenue to the Municipality, would, under ordinary circumstances, act as an absolute exclusion of it. The rule for an injunction must be made absolute; costs are reserved to the hearing.

[ORIGINAL CIVIL JURISDICTION.]

1875.
July 23.

Suit No. 827 of 1873.

BHA'URA'M MADAN GOPA'L*Plaintiff.*

v.

RA'MNA'RA'YAN GOPA'L and others*Defendants..*

Stamp—Document—Evidence—Act XVIII. of 1869, Sections 5, 18 and 28.

A document, which by law requires a one-anna adhesive stamp to be affixed, must be received in evidence, if, at the time of its being tendered, it bears the requisite stamp, even though such stamp has been affixed subsequently to the execution of the document.

THE plaintiff sued on an account adjusted in his book and signed by one of the defendants, and on three subsequent adjustments, founded on the first, and contained in three letters signed by the same defendant. At the hearing before Pinhey, J.,

Inverarity, who with *Parcell* appeared for the plaintiff, put in evidence the adjustment in the plaintiff's book, which was then duly stamped with a one-anna adhesive stamp.

Badrudin Tyahji, who with *Farran* appeared for the defendants, in cross-examination of the plaintiff, elicited the fact that the stamp was not affixed at the time that the signature to the adjustment was taken, but was affixed by the plaintiff himself some time subsequently to the adjustment.

In his address to the Court, *Badrudin Tyahji* contended that, the stamp having been affixed subsequently to its execution, the document was not properly admissible in evidence, and ought not to be considered by the Court.

Inverarity called the attention of the Court to an unreported decision of a Full Bench of the High Court in the case of *Punjá Pallan v. Shekh Adam* and another.

PINHEY, J. :—I certainly was not aware of the existence of such a decision. However, that being the decision of a Full Bench of this Court, whatever may be my own opinion I consider that, sitting alone in a Division Court, I am

bound by it. I must, therefore, hold that the adjustment in his book, relied on by the plaintiff, is properly admissible in evidence.

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Note.—The case referred to was that of *Panjá Pallan v. Shekh Adam Abdula and Baba Saheb Bisla*, Cause No. 11315 of 1872 in the Bombay Court of Small Causes, referred by J. O'Leary, First Judge, for the opinion of the High Court under Act IX. of 1850, Section 53, on 30th August 1872, with the following statement :—

“ This case was originally heard on the 16th July 1872 by the Fourth Judge of this Court, sitting under Section 23 of Act IX. of 1850, and was non-suited by him under the following circumstances :—

“ The plaintiff produced in support of his case a document (a copy translation of which, marked A, is annexed) the first entry of which, under Act XVIII. of 1869, Schedule II., Clause 5, required a stamp of one anna. When it was for the first time tendered in evidence before the Court on 16th July, it bore an adhesive stamp of one anna in value ; but inasmuch as the same document had been, on a previous occasion, produced before the same Judge, and it then bore no stamp, the Judge held that, under Section 28 of the Stamp Act, the document could not be received in evidence, inasmuch as it had been stamped ‘subsequent to the execution thereof’. The fact of the document having been thus stamped after its execution, was also admitted by the plaintiff.

“ The plaintiff, being unable to substantiate his case without the document in question, was non-suited.

“ On 30th July 1872 the plaintiff applied to the Bombay Court of Small Causes, consisting of the First, Third, and Fourth Judges, for a new trial on the ground that the learned Fourth Judge was wrong in rejecting the document A.

“ The said Court ordered a rule *nisi* to issue on the said application for a new trial, which order was, on 13th August, made absolute. But the Judges, entertaining doubts upon the question of law involved in the case, made the said judgment (that the rule be made absolute) contingent upon the opinion of the High Court on the following case, which they now beg to state to the High Court.

“ When a document, which under Act XVIII. of 1869 requires a stamp of one anna, is tendered in any Court, and, at the time it is so tendered, bears the requisite stamp, but it is within the knowledge of the Court that such a stamp was affixed to the document subsequent to its execution, is the Court at liberty to receive the document, or is it bound to reject it ?

“ In support of the ruling of the Fourth Judge at the hearing, Section 28 of the Stamp Act is relied on as containing an absolute prohibition of the stamp.

as it took place in the present case, and Section 29 of the same Act would

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appear to attach a criminal penalty to the act of stamping as aforesaid. The principle also laid down in *De Begnis v. Armstead* (10 Bing. 107) and *Ferguson v. Norman* (6 Scott 794), namely, that any contract which is made penal by any statute is void, may perhaps, by analogy, be applied to the present case, and the stamping of the document in violation of Section 28 of the Stamp Act may be treated as a nullity. Holding the stamping after execution to have the effect of making the document admissible, would also appear to open a wide door for fraud on the revenue, and would apparently result in this, that the Civil Courts would recognize and sanction the doing of an act declared by the Legislature to be criminal.

"On the other hand the Judges entertain doubts whether, under the peculiar wording of Section 18 of the Stamp Act, a Court is authorized to reject a document presented to it under the present circumstances. This appears to be the only section giving power to a Court to reject, for want of stamp, a document otherwise legal evidence in the cause. The language of that section seems exclusively to refer to the state of facts at the time the document is produced in Court. The words 'unless it shall be stamped according to the law in force at the time of its execution,' or any equivalent, seem to be studiously avoided, and some of us entertain doubts whether, when a document, when presented to the Court, 'bears a stamp of a value not less than the amount of the duty with which it is chargeable, &c.,' we have any power to reject it. In other words, we doubt whether we have any right to construe Section 18 as if it contained the words 'unless it shall have been stamped according to law.' It has been suggested that this form of Section 18 was adopted in order to avoid the exclusion of certain documents which bore a stamp of sufficient value, but were not stamped 'according to law,' e. g., promissory notes payable on demand, executed prior to the present Act, bearing an adhesive stamp of one anna instead of an impressed stamp of the same value.

"It appears also not unworthy of notice that if the affixing of a one-anna stamp on a document subsequent to its execution be a nullity, the law is constantly violated, even by the officers actually engaged in the collection of the public revenue. It is believed to be their practice to sign, and in every respect execute, receipts for taxes in large numbers on unstamped paper, and only to affix the stamp on payment of the money.

"Under these circumstances we respectfully request the opinion of the High Court on the question stated above."

The first entry in the document A, referred to in the foregoing statement, was as follows:—

"The account of Mussalman Shekh Adam hekh Abdula and Ababin Baba Sahab Biala, the two individuals, for Samvat year 1928, the 18th day of cbruary 1872, the day of the week—Sunday.

Cr.

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120-12. The 18th day of February of the year 1872, the balance of the old account; the money in respect of rice is Rs. 120-12-0. Page 134.

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Shekh Adam bin Shekh Abdula × his signature. Agreeably to what is written above, Rs. 120-12-0.

The hand-writing of Ahmed bin Suleman Khunadkar; this is written at the request of the parties.

120-12. Aba bin Baba Bisla, his signature. Agreeably to what is written above, Rs."

The reference was considered by a Full Bench consisting of Sargent, McIlvill, and Green, JJ., neither of the parties being represented by counsel, and the following was the judgment of the Court delivered by

SARGENT, J.:—We are of opinion that the document should have been received in evidence. It is not excluded by the terms of Section 18, and although perhaps excluded by the spirit of the Act, as shown by the express prohibition against stamping such a document after execution, contained in Section 29, coupled with the wording of Section 26, still it is not so by the letter of the law.

The rule as laid down by Lord Cairns in *Partington v. Attorney General* (L. R. 4 H. L. 100; see p. 122), when discussing the construction of fiscal legislation, is applicable to the present case.

[APPELLATE CIVIL JURISDICTION.]

1875.
September 8.*Miscellaneous Special Appeal No. 2 of 1875.*

KHUSA'LDÁ's by his Agent ANANT }
 BA'BURA'V..... } *Appellant.*

SAKHA'RA'M RA'MCHANDRA DIKSHIT..... *Respondent.*

The Code of Civil Procedure, Sections 284-5—Decree against a 3rd class Sirdár—Execution against his son.

Under the authority of Section 284 *et seq.* the Court of the Agent for Sirdárs, not having jurisdiction over a Sirdár's son who is not himself a Sirdár, cannot transfer a decree passed against the Sirdár to a Civil Court for execution against the son. To obtain enforcement, in such a case, against his heir of a decree against the Sirdár, the decree-holder may file a suit in the ordinary Civil Court on his decree.

THIS was a miscellaneous special appeal from the decision of Edward Cordeaux, Assistant Judge of the District of Poona, reversing an order of the Subordinate Judge of Poona.

The facts of the case are shortly these:—The special appellant obtained a decree in the Court of the Assistant Agent for Sirdárs in the Deccan against the grandfather and father of the special respondent, both of whom were sirdárs of the 3rd class. After their death the decree-holder obtained a certificate, under Section 285 of the Civil Procedure Code, from the Assistant Agent's Court, and sought to attach, through the Court of the Subordinate Judge at Poona in execution of his decree, certain property which was in the possession of the respondent as heir of the judgment debtors. The respondent, however, was not himself a sirdár.

The special respondent objected to the execution on the ground, among others, that the Agent's Court had no jurisdiction over him, as he was not a sirdár, and that, therefore,

the decree could not be executed by the 1st Class Subordinate Judge. This objection was overruled, and the execution was directed to proceed; but on appeal the Assistant Judge held that the order of the Subordinate Judge was without jurisdiction. On the authority of the interpretation of the Bombay Government on Sections 3, 4, and 5, of Regulation XXIX. of 1827 *in re Sadáshiv Rámchandra*, 15th December 1834, and of a resolution of the Sadr Diváni Adálat, 21st December 1853, *in re Yeshwantrav Parlikar*, the Assistant Judge held that the decree of the Agent's Court could not be executed by the Subordinate Judge's Court. He was of opinion that Section 284 of Civil Procedure Code, and the following sections which refer to execution matter, relate to the cases in which the Court, which passed the decree, would have jurisdiction to execute it.

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The special appeal was heard by KEMBALL and NA'NA'BHA'I HARIDA's, JJ., 17th August 1875.

Máhadev Chimáji Apte for the special appellant—Section 284 of the Code seems to have been enacted specially to meet such a case as the present. [KEMBALL, J. :—Can you cite any case in support of your contention and showing the practice of the Court of the Agent for Sirdárs in executing decrees ?] No, I cannot now.

There was no appearance on behalf of the special respondent, and the case was at this stage adjourned to allow of the pleader for the special appellant searching for authorities in support of his contention. On the case being again called on for hearing on 8th September 1875 he admitted that he had been unable to find any.

Per Curiam.—The Assistant Agent for Sirdárs could not transfer the decree of his Court to that of the 1st Class Subordinate Judge, and, therefore, the latter Court could not execute it; but the decree-holder may file a suit in the Civil Court on this decree against the heir.

Order affirmed.

[APPELLATE CIVIL JURISDICTION.]

1875.
September 20.*Miscellaneous Special Appeal No. 12 of 1875.*

KNUSA'LCHAND, heir of deceased AMAR- }
 CHAND (*Original Plaintiff*) } *Appellant.*

MA'HA'DEVGIRI, heir of deceased RAJEN- }
 DRAGIRI (*Original Defendant*) } *Respondent.*

Grant to a Gosavi and his disciples—Life interest.

A grant to a *Gosavi* and his disciples in perpetual succession, coupled with directions which practically make it an endowment of a *math* with a limitation of the enjoyment to a particular line of celebrants of the worship therein, does not entitle an individual *Gosavi* to incur the endowment beyond his own life.

The English law relating to superstitious uses does not apply in the case of Hindu religious endowments.

THIS was an appeal from the decision of A. Bosanquet, Judge of the District of Ahmednagar, reversing on remand from the High Court the decree of Parushotam Binewale, 1st Class Subordinate Judge of Ahmednagar, who decided in favour of the plaintiff.

The facts of this case are briefly these:—On the 14th of January 1862 the plaintiff obtained a decree against the defendant, directing the latter to pay from his mortgaged *mokasá* allowance a debt due to the former. In 1867 the plaintiff applied for execution, and under the order of the Court attached the allowance and received the proceeds of it from year to year until 1871. The defendant having subsequently died, the plaintiff got the present respondent entered on the record in his stead as his heir, and got also a guardian appointed to him, the respondent himself being a minor. To the further execution of the plaintiff's decree it was objected, on the respondent's behalf, that the deceased defendant ceased to have any interest in the *mokasá* allowance after his death, and it could not, therefore, be attached. This objection was

disallowed by the Subordinate and District Judge, but was allowed by the High Court in special appeal, and the case was remanded to determine the nature of the allowance sought to be attached. On remand the District Judge found that the grant was by H. H. Jánkojiráv Scindia to Rajendragiri, the defendant, in 1838, and confirmed an older grant made by the Peishwá. The grant declared that the allowance was to be enjoyed by Rajendragiri and his disciples and successors from generation to generation. The purpose for which the grant was made, was not expressly stated in the documents, but in a letter by the Rájáh of Satara to Govind Gosávi the allowance is stated to have been given for the worship of the goddess of wealth and for feeding and otherwise supporting poor and deserving people. The District Judge held that the interest of Rajendragiri under the circumstances did not extend beyond his life, and he, consequently, decreed against the plaintiff.

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Against this order the appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Dhirajlál Mathurádas (Government Pleader) for the appellant.—The *mokási* allowance was the absolute property of Rajendragiri. It was granted to him and his disciples for ever, and resembles in every respect a grant to a man and his heirs for ever. There is no restriction whatever placed on the grantee's ownership.

No one appeared for the respondent.

Per Curiam :—We cannot accede to the argument urged for the appellant in this case, that a grant by a sovereign to a *gosávi* and his disciples in perpetual succession, being equivalent to a grant to a man and his heirs, and the latter conveying a title of which the grantee may immediately dispose, each *gosávi* also in succession has a right to sell or encumber the property granted to him and his disciples. A grant to a *gosávi* and his disciples is intended by a Hindu grantor to be a perpetual fountain of merit producing benefit to himself, and this intention would be entirely defeated

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by the diversion of the gift at the will of any unprincipled successor of the original grantee to purely secular uses. In the particular case before us, the *gosávis* are the ministers of a *math*, and the Peishwá in making the grant enjoined on the grantee, in words sufficient to constitute a trust, the celebration of worship to the goddess ("Shri"), the recitation of prayers, and the entertainment of the poor. Such objects, however some of them might, according to English notions, be deemed superstitious uses, are allowable and commendable according to the Hindu law. See Jagannath's Commentary, Col. Dig. Bk. II., C. IV., T. 33. Even of the property belonging to a family it is prescribed by Katyayana (Vyav. Mayukh, Ch. IV., Sec. VII., Pl. 23) that any portion once assigned for purposes of religion shall be excepted from partition so as to be kept available for its intended object. In Bengal it has been held, in the case of *Mohant Burm Suroop Dass v. Khashee Jhu and others* (a), that a *Mohant* in charge of an endowment cannot, except distinctly for its benefit, incumber it beyond his own life, and we think that the case of the *gosávis* holding under the grant we are now considering, falls within the same principle. The grant was to the *gosávis* and their disciples, but coupled with directions which practically made it an endowment of the *math* with a limitation of the enjoyment to a particular line of celebrants of the worship therein. This being so, an individual *gosávi* was, in our opinion, no more at liberty to sell the endowment than a *vatandár* the endowment of his office. We, therefore, confirm the order of the District Judge with costs.

Decree confirmed.

(a) 20 Cal. W. R. 471, Civ. Rul.

[CROWN SIDE.]

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1875.
August 17.*Ex parte* MA'DAVJI DHARRANSI.....Applicant.*High Court Criminal Procedure Act, X. of 1875, Sections 115, 147—Certiorari—Order of reference—Act XIII. of 1856, Section 36—Order for delivery of property—Examination of witnesses.*

Semle that the "case" mentioned in Section 147 of the High Court's Criminal Procedure Act, X. of 1875, must refer to some question in the nature of a criminal proceeding, and not to a matter of a *quasi* civil character, such as the reference to a Police Magistrate contemplated in Section 115.

The power of the High Court to issue a writ of *certiorari* has not been taken away by Section 147 of the High Court's Criminal Procedure Act, X. of 1875.

The words "any property" in Section 115 of the High Court's Criminal Procedure Act, X. of 1875, include as well property voluntarily produced before the Magistrate by a witness in the case, as property seized by the Police or found on the person of the prisoner.

The reference to a Magistrate under Section 115 of the High Court's Criminal Procedure Act, X. of 1875, is not a trial for the final determination of the rights of the parties, and it is not incumbent upon the Magistrate on such reference to hear witnesses, but he may rightly order the delivery of property to that one of the rival claimants whom he considers, upon the statement of their respective cases, to have made out a *prima facie* case, and it is not competent to the High Court to review the decision at which the Magistrate so arrives.

THE applicant in this case claimed to be the *bond fide* purchaser for value of a certain share certificate in the now Dhurrunsey Punjábhooy Spinning and Weaving Company, and as such to be entitled to the possession thereof against the actual owner and his pledgee, from whom it had been stolen prior to the sale to the applicant. The Magistrate had ordered the share certificate to be restored to the pledgee of the real owner, and it was in consequence of such order of the Magistrate that the present application was made to the High Court.

Inverarity on 27th July 1875 obtained a rule *nisi* on behalf of the applicant, that the case of *Reg. v. Rámdás Sámalda's* and all proceedings had and taken therein before Náná Moroji, Esq., Magistrate of Police for the Town and Island of Bombay, relating to the share certificate in question, should be transferred into the High Court, or that a writ

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of *certiorari* should issue to the Magistrate to bring into the High Court the case and proceedings and all papers relating to the matter, unless he should show cause to the contrary.

Purcell (*Jardine* with him) showed cause on August 14.

Inverarity in support of the rule.

Cur. ad. vult.

The following judgment, setting forth all the facts of the case, was delivered, on August 17th, by

MARRIOTT, J.:—The matters in question on this rule arise out of the conviction of one Rámdás Sámaldás who pleaded guilty before me, at the last Criminal Sessions of the High Court, of the offences of theft and of criminal breach of trust as a servant of [amongst other property] one share certificate with blank transfer deed attached in the Now Dhurumsey Punjábhoy Spinning and Weaving Company, -No. 37, and standing in the books of that company in the name of Dhurumsey Punjábhoy. Upon such conviction, in accordance with what has been the ordinary practice of the High Court when a question respecting the ownership of the stolen property arises, and for which provision is now made by Section 115 (a) of the High Court Criminal Procedure Act, X. of 1875, the matter was referred to the committing Magistrate, Mr. Náná Moroji, then Acting Second Magistrate of Police in Bombay. It appears from the affidavit of Huridás Nuthubhoy, and it is not disputed, that in the month of June 1874 Dhurumsey Punjábhoy had sold the share in question to the firm of Hurgovundás Cuberdás, and at the

(a) "When the trial is concluded, the Court may make such order as it thinks fit for the disposal of any property produced before it, regarding which any offence appears to have been committed. Any order made by this section may be in the form of a reference to a Magistrate, who shall in such case deal with the property as if it had been seized by the Police, and the seizure duly reported to him.

EXPLANATION.—In this section the term 'property' includes not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

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time of such sale had executed a blank transfer and application for transfer to that firm; that in the same month of June the firm of Hurgovundás Cuberdás pledged that share with the firm of Gungádás Vizbukundás, and at the same time handed over the share certificate and blank transfer and application for transfer to Nursidás Jaitráam, the *munim* of the firm of Gungádás Vizbukundás, as security for a loan. The prisoner, Rámdás Sámaldás, was a servant of the firm of Gungádás Vizbukundás, and the theft was discovered on the 18th of February last, but must have been committed some days previously. The *sikre* was transferred from the name of Dhurumsey Punjábhoy into that of Sorábji Hormasji Jussáwállá on the 11th of February last, and it appears from the affidavit of the applicant, Mádevji Dharramsi, that he, in the usual course of business, on the 2nd of April last, purchased the share in the share market in Bombay through a broker named Cupurchund Cursondás, at the then market price of Rs. 1,320, and that on the 5th of that month the transfer deeds were, together with the share certificate, deposited at the company's office. The purchase money was paid, and on the same day the share was transferred into the name of the applicant, Madavji Dharramsi. In order to effect the transfer to Sorábji Hormasji Jussáwállá, the prisoner must have fraudulently filled up the blank transfer and application for transfer signed by Dhurumsey Punjábhoy. On the 9th of June last, the share certificate was produced by the *gumastá* of the applicant before Mr. Náná Moroji, before whom the prosecution was then pending previous to committal. Mr. Náná Moroji retained the share certificate as one of the exhibits in the case, and it was one of the exhibits sent up to this Court with the case. On the 22nd of July last, the question as to the disposal of the share certificate, under an order of reference, came on before Mr. Náná Moroji, when the applicant, Madavji Dharramsi, appeared and claimed by his solicitor, Mr. Rimington, to be entitled to the share as a *bonâ fide* purchaser thereof for value in the open share market in Bombay, without notice of the fact of its having

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been stolen property. But the Magistrate ordered the share certificate to be delivered up to Nurseydás Jaitráam, the *munim* of the firm of Gungádás Vizbukundás. The rule *nisi* in this matter, granted on the 26th of July last, directed that the case and all proceedings had and taken therein, relating to a certain share certificate, No. 37, in the New Dhurrimsey Punjábhooy Spinning and Weaving Company, Limited, be transferred into the High Court, and that the said Náná Moroji do transfer the same and all papers relating to the said matter into the High Court accordingly ; or that a writ of *certiorari* do issue out of the said High Court, directed to him, the said Náná Moroji, to bring before the High Court the said case and proceedings mentioned, and all other papers relating to the said matter, &c. The rule was so granted in the alternative, because I had doubts, when the rule was moved for by Mr. Inverarity, whether this was a matter within the provisions of Section 147 of the High Court Criminal Procedure Act, X. of 1875. That section provides—"Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any criminal Court situate within the local limits of its ordinary original criminal jurisdiction ; and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." It appeared, and still appears, to me that the "case" mentioned in that section must refer to some question in the nature of a criminal proceeding, and could not refer to a matter of a *quasi* civil character, of which a reference to the Police Magistrate under Section 115 of the same Act partakes. But, be that as it may, it appears clear to me that this Court, which, like the Court of Queen's Bench in England, has a superintendence over all inferior Courts within its jurisdiction, and may remove all proceedings therein depending and transfer them to its own jurisdiction, has power to issue a

writ of *certiorari* in a case like the present. It was, indeed, contended on the argument of the rule that the writ of *certiorari* was taken away by Section 147 of the High Court's Criminal Procedure Act; but, although that section gives power to the Court to remove cases from inferior Courts by the form of procedure there given, yet I apprehend the jurisdiction of this Court to issue writs of *certiorari* could only be taken away by express enactment, and that this Court has still jurisdiction to issue that writ in cases to which that section does not apply (*b*). The rule came on for argument on Saturday last, when it was objected on behalf of the applicant that the order of reference to the Magistrate had not been drawn up, and, therefore, that the Magistrate had no jurisdiction. It has not been the practice to draw up these orders, but that does not render the order invalid, and it is not the less an order of the Court because it has not been drawn up. It was further objected on behalf of the applicant that, as this share-certificate had not been seized by the police or been found on the person of the prisoner, but had been produced before the Police Magistrate by a witness, the provisions of Section 115 of the Act did not apply. The words of the section are—"When the trial is concluded, the Court may make such order as it thinks fit for the disposal of any property produced before it, regarding which any offence appears to have been committed. Any order in this section may be in the form of a reference to a Magistrate, who shall in such case deal with the property as if it had been seized by the police, and the seizure duly reported to him." The share certificate was the property regarding which the theft, for which the prisoner was convicted, had been committed, and the words "any property" are certainly large enough to include property whether seized by the police or produced by a witness in the case. In the case of *R. v. Stanton* (*c*) the prisoner was indicted for the theft of a £10 Bank of England note, which had been subsequently paid by the bank, and which was produced in Court by a

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(b) See *R. v. Rice*, 1 W. Bl. 231; *R. v. Allen*, 15 East 333.

(c) 7 C. & P. 431.

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clerk of the bank. The prosecutrix applied for a return of the note under the Act then applicable, 7 and 8 Geo. IV., C. 29, S. 57. The Court declined to make the order, as the note had been paid by the bank, and the proviso of that section was applicable, but it does not appear that the Court doubted its power to make the order, because the note was produced by a witness. To put the construction contended for on the section, would be not to give full effect to the words in their natural and ordinary sense, and would, I think, limit the beneficial effect of the section, which was intended to provide a simple and immediate means for the restitution of stolen property. It was further contended that the Magistrate had refused to permit the applicant to call any witnesses, and also that no opportunity was given of cross-examining Nurseydás Jaitráam, whereby it was suggested such a case of negligence might be made out as would disentitle him to a return of the share certificate. The Magistrate has not made any affidavit, and the only account of what took place before him is that contained in the affidavit of the applicant. In the 5th para. he says:—"On or about the 13th July 1875 I was served with another summons issued by Mr. Náná Moroji, calling on me to attend before him and show cause why the said certificate of share No. 37, therein described as having been detained in the case, should not be returned to the complainant; in obedience to which I attended with my solicitor, Mr. Rimington, on the 22nd July, and my said solicitor then urged before the said Magistrate that I was the *bond-fide* purchaser in the open market of the said share for valuable consideration, without notice of any claim thereto whatsoever, either on the part of the complainant Nurseydás Jaitráam or of any person other than the said Sorábji Hormasji Jussáwallá, who was the registered holder and owner of the share at the time of such purchase; and submitted that, as the certificate on the face of it showed that I was the registered holder of the share, and that it had been transferred from time to time in manner aforesaid, the said share certificate ought to be returned to me as the person entitled thereto, and from whose custody

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it came into the hands of the Magistrate; and that if the Magistrate had any doubt as to my right to have the share certificate delivered to me without further enquiry, I was prepared to adduce evidence before him to show that the facts hereinbefore stated, as to the circumstances under which I acquired the said share, were true. The Magistrate, however, said that he did not wish to hear any evidence on the subject, that he did not wish to decide anything as to the legal rights of the parties; but that he would order the said certificate to be delivered up to the complainant, and that I could resort to the civil court to enforce my right to the said share if I was so advised," &c. Upon that statement it appears that the applicant had an opportunity, through his solicitor, of stating his case, and the effect of the evidence he was prepared to adduce, and it does not appear from the affidavit that any application was then made to cross-examine Nurseydás Jaitrámi. That suggestion was made on the argument of the rule. In order to decide whether the Magistrate was wrong in not permitting the applicant's witnesses to be examined, it is necessary to look at the character of the proceedings before him. Section 115 provides that the Magistrate, when an ordinary reference is made to him, "shall in such case deal with the property as if it had been seized by the police and the seizure duly reported to him." In Bombay, jurisdiction as to the disposal of stolen property is given to Police Magistrates, by Section 36 of Act XIII. of 1856, which provides that "it shall be lawful for any Magistrate to make an order for the delivery of such property to the party who shall *appear to be* the rightful owner thereof," and the section also provides that no such order shall bar the "right of any person to sue the party to whom the property shall be returned, and to recover such property from him by action at law, so that the action be commenced within two months after such order shall have been made." It appears to me upon that section that the proceeding before the Magistrate was not intended to take the form of a regular trial, wherein the rights of the parties were to be finally determined, but rather of a preliminary

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proceeding, wherein the Magistrate, upon the statements of the respective cases of the rival claimants, should make an order for delivery of property to the one which he considered had made out a *prima facie* case. If the correctness of the Magistrate's decision be impugned, that may be done as in this case in a civil suit. That being so, it does not appear to me that it was incumbent upon the Magistrate to hear the applicant's witnesses, the effect of whose evidence and the alleged legal result therefrom he had heard already stated before him by the applicant's solicitor, and it is not competent to this Court to review the decision of the Magistrate, even if I were of opinion—which I am not—that he had come to a wrong conclusion as to the disposal of the property upon the statements before him of the cases of the respective claimants (*d*). For these reasons I think the rule must be discharged, and with costs.

(*d*) With regard to the correctness of the Magistrate's conclusion as to the disposal of the property, see the case of *Swan v. The N. British Australasian Company* (2 H. & C. 175) affirming the judgment of the Court of Exchequer (7 H. & N. 603).

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 24 of 1874.

June 14.

SA'VITRIAVA' and another... *Defendants and Appellants.*

ANANDRA'V, deceased;
his sons and heirs,
APA' SA'HEB and BA'-
BA' SA'HEB ... } *Plaintiffs and Respondents.*

Watan—Partition of watan—Cessation of duties attached to watan.

A cessation, (even though sanctioned by the Government,) of the performance of the duties attached to an impartible *watan*, does not alter the nature of the estate and make it partible.

THIS was an appeal from the decision of A. M. Cantem, 1st Class Subordinate Judge of Dharwar, in original suit No. 613 of 1866.

The appeal was argued before WESTROPP, C.J., and LARFENT, J.

Rāv Sāheb Vishvanāth Nārāyān Mandlik for the appellants.

Bahiravnāth Mangesh for the respondents.

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The facts of the case, in so far as they are material for the purposes of this report, are stated in the judgment of the Court delivered by

WESTROPP, C.J. :—Mulápá, the last male who (before the second defendant) performed the duties of the four offices of Nadgavdá, Deshgat, Gavdá (*alias* Pátíl), and Patanshetayuki of Narendra, and enjoyed the *watan* thereto appendant, died childless in A.D. 1830. The late plaintiff, Anandrāv, who was the son of Dada Tumápá, one of Mulápá's four brothers, did not institute any suit to obtain a share of the *watan* until 1866, *i.e.*, a period of 36 years from the death of Mulápá. Sakravá, the elder widow of Mulápá, succeeded him, and managed the offices as well as the *watan* until A.D. 1846, when she, with the consent of the revenue authorities, made over the management to Sávitriavá, the junior widow of Mulápá, who continued to manage the offices and *watan* until 1856, in which year, in pursuance of her request made in 1854, Kumárgavdá, the second defendant, was substituted by the revenue authorities as *vahivátlár* of the offices and *watan*. He is the son of Venkawgavdá, who was the eldest son of Fakirápá, the brother of, and next in seniority to Mulápá. If, as the defendants contend, the *watan* be impartible and should follow in descent the law of primogeniture, Kumárgavdá is the next male heir of Mulápá. The plaintiff is in the enjoyment of three fields and a house as *potgi*, to which he succeeded on the death of his father Dada Junápá in A.D. 1814 or 1815. That *potgi* is maintenance out of the family estate; other junior branches of the family are also in the enjoyment of *potgi*. In 1821 an attempt by suit against Mulápá made by Basápá, one of the brothers of Mulápá, failed. It was referred to arbitration, and the arbitrators in that year (see Exhibit 58), in rejecting his claim, stated that Basápá had been in the enjoyment of *potgi*, and was not entitled to more, the estate being in their opinion

1875. impartible, and proved to be so for several generations. The plaintiffs' acquiescence of 36 years in the exclusive possession, first of Sakravá, next of Sávitriavá, and, lastly, of Kumárgavdá, and remaining, throughout that time, content with his *potgi* inherited from his father, tells strongly in favour of the impartibility, according to custom, of the *watan*. The plaintiff (who was divided in food and residence from Mulápá and his family), evidently sensible that his acquiescence would, without some explanation, have that effect, relied upon Exhibit 54 (purporting to be dated as of the 20th May 1830) as such an explanation. But the Subordinate Judge has, for apparently good reasons, held it to be spurious and fabricated. His finding on that point has not been impeached by the plaintiff on this appeal, although he has attacked some of the other rulings of the Subordinate Judge. We, while adhering to our previously expressed view, (a) that clear and satisfactory evidence of a custom contrary to the ordinary rule of Hindu law is necessary for its establishment, are of opinion that the Subordinate Judge was right in finding that by family custom the *watan* was impartible, but we cannot agree in his decision that it has now become partible. We differ from him on that point, 1st because there is not any evidence that the duties of the four offices, or of any of them, are no longer performed by the *watandár*. The evidence is rather in the opposite direction. The revenue authorities appear to have recognized first the elder widow, next the junior widow, and, lastly, Kumárgavdá, as the officiator. But, even if the offices have become, as conjectured by the Subordinate Judge, sinecures, that circumstance would not render the *watan* appendant to them partible. There is not any authority for holding that a cessation of the performance of the duties of the office, even though sanctioned by Government, would alter the nature of the estates appendant to them (b). The decision

(a) See 7 Bom. H. C. Rep. A. C. J. 175, 10 Bom. H. C. Rep. 260.

(b) See *Rajkishen Singh v. Ramjoy Surma Mozoomdar*, L. R. Ind. App. P. C. 186, 191, published since this case was decided, and which supports the view here expressed. See also *Bahoo Beer Pertab Sahoe v. Maharajah Rajinder Pertab Sahoe*, 12 Moo Ind. App. 1.

of the Subordinate Judge's predecessor, to which he refers, appears to have been appealed against. It has been stated at the bar by the appellants' pleader to have been reversed, but there is not any evidence on that point. We, therefore, do not know what was the result of that appeal, and, for aught that appears to the contrary, that case may have been decided in the Court of first instance for want of the evidence of custom which exists in this case.

Again, even if the merits of this case were with the plaintiffs, which in our opinion they are not, their suit is completely defective for want of parties. None of the junior members of the family (who would be co-parceners if the plaintiffs' case be true) have been made parties to it. Further, these junior branches are holders of *potgi*; and, unless their *potgi* as well as that of the plaintiff were brought into hotchpot, no proper partition could be made. The plaintiff has not even offered to bring his *potgi* into hotchpot.

It might be a question whether, in the case of so stale a claim as that of the plaintiff, we could properly allow him to amend his plaint at this stage by adding parties.

It is unnecessary to decide that question, as, for the reasons already given, he must fail on the merits.

We reverse the decree of the Subordinate Judge, and direct the plaintiffs to pay to the defendants the costs of the suit and of this appeal, and dismiss the plaintiffs' claim.

Decree accordingly.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Regular Appeal No. 6 of 1874.

KRISHNARA'V.....*Plaintiff and Appellant.*

June 15.

ANTA'JI VIRUPUKSHA*Defendant and Respondent.*

Act VII. of 1870, Section 11—Additional stamp duty—Interest on decree.

The Court Fees Act (No. VII. of 1870), Section 11, is not applicable to interest accruing upon a decree in a suit which is neither for mesne profits nor for immoveable property, nor for an account, but simply an action for money lent.

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THIS was a miscellaneous regular appeal from the order of C. H. Shaw, District Judge of Belgaum.

The facts of the case are briefly these :—

On the 8th of March 1875 a decree was passed by the High Court in Regular Appeal No. 11 of 1861 in favour of the appellant. The decree awarded payment, by the respondent to the appellant, of a certain amount of money lent by the latter to the former, together with interest from the date of suit up to the date of payment. The appellant made the present application to recover Rs. 34,092-3-0, being interest due on the said decree. The District Judge held that, under Act VII. of 1870, Section 11, the plaintiff was liable to pay additional stamp duty (Rs. 1,035) on the amount which he sought to recover, and made the following order :—

“The Court has no doubt that the intention of Section 11, Act VII. of 1870, is that only relief to the extent of the value covered by the decree can be afforded, and, if anything more is claimable, additional fees must be paid. Interest is a constantly accruing cause of action as much as mesne profits, and the difference of fees must be made up by petitioner. The Court, however, allows four months' delay, and accedes to the petitioner as to attachment of the crops, and directs that they be placed in deposit or the proceeds thereof.”

The appeal was heard by WESTROPP, C.J., and LARPENT, J.

Manikshā Jehāngīrshā for the appellant.

No one for the respondent.

WESTROPP, C.J. :—It appearing to the Court that Section 11 of Act VII. of 1870, upon which the District Judge has acted, is not applicable to interest accruing upon a decree in a suit—which suit was neither for mesne profits, nor for immoveable property and mesne profits, nor for an account, but simply an action for money lent—the Court reverses the order of the District Judge without costs. If the amount of stamp duty, charged by the District Judge under that section, has been lodged, the same should be refunded to the plaintiff.

Order reversed.

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 21 of 1874.*VRA'NDA'VANDA'S RAMDA'S... *Plaintiff and Appellant.*1875.
June 28.YAMUNA'BA'I..... *Defendant and Respondent.**Undivided Hindu family—Gift—Maintenance—Concubine.*

A member of an undivided Hindu family, on this side of India, cannot, without the consent of his coparceners, make a gift of his share in the undivided property.

Gangubai v. Ramdada (3 Bom. II. C. Rep. A.O.J. 66) followed.

G, a member of an undivided Hindu family, died, leaving him surviving two nephews, V. A. and V. R., and Y., a concubine of G. V. A. lived with G. at the time of his death, and had the whole of G.'s property, moveable and immoveable, left in his (V. A.'s) possession. V. A., before his death, made a gift of the said property to Y. in consideration of her having been G.'s concubine for many years. In a suit brought by V. R. to recover the whole property from Y, she claimed it by virtue of the gift to her by V. A.

Held that the gift was invalid as against V. R., who was entitled to the whole property, subject to the maintenance of Y. as a concubine of G. for many years; the High Court also directed the said maintenance to be secured for her (Y.) by investment of a sufficient part of the property in trust for that purpose.

THIS was a regular appeal from the decision of Mahádev Govind Ránade, 1st Class Subordinate Judge of Poona.

The facts of the case are briefly these :—One Gokaldás, a member of an undivided family, died on the 27th August 1867, leaving him surviving two nephews, Valabhdás and Vrándávandás (plaintiff), and the defendant Yamunábái, who had lived with Gokaldás, for many years, as his concubine. Gokaldás, at the time of his death, lived in Khed, in the District of Poona, with his nephew Valabhdás and his concubine Yamunábái, while Vrándávandás lived in Barhánpur, in the District of Khandesh. The whole of Gokaldás's property, moveable and immoveable, was left in the possession of Valabhdás at the time of Gokaldás's death. Valabhdás subsequently died on the 5th July 1871, but, before that event took place, had made a gift (in writing) of the whole of the property to Yamunábái, because she had been his uncle's concubine for a very long time.

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The plaintiff, therefore, brought the present suit to recover the property from Yamunábái as the sole surviving member of Gokaldás's family. The defendant, *inter alia*, answered that she was entitled to the property by virtue of a gift made to her by Valabhdás. The Subordinate Judge held the gift by Valabhdás valid to the extent of his own share in the property, and awarded to the plaintiff half of the estate claimed, giving a decree to the defendant for the other half.

In appeal it was contended that the gift, by Valabhdás, of his undetermined half share in the joint family property was invalid without the consent of the other coparcener, the plaintiff.

The special appeal was argued before WESTROPP, C.J., and LARPENT, J., on the 28th June 1875.

Ghanashám Nilkantha Nádkarni for the appellant.

Shántúrám Náráyán for the respondent.

WESTROPP, C.J. —We so far concur with the Subordinate Judge as to hold that Valabhdás and the original plaintiff were brothers united in estate. No partition between them has been directly established, nor are there any circumstances in the case sufficient to raise an implication of a partition. This being so, the Subordinate Judge was right in holding that Valabhdás had not power to alienate the whole of the estate of their deceased uncle, Gokaldás. But he upheld the deed of gift executed by Valabhdás on the 16th June 1871 to the defendant to the extent of the share of Valabhdás in that estate. The deed recites the fact that the defendant had lived from her infancy with Gokaldás as his wife. No other consideration for the gift is stated. In point of fact she lived from the time of her being eleven or twelve years of age with Gokaldás as his concubine until his death—a period of about forty years. Assuming for a moment that a past cohabitation of the defendant with Gokaldás would have been a sufficient moral consideration to have supported a deed of gift by him to the defendant of his share in family property, we are at a loss to understand how such a cohabitation by

the defendant with Gokaldás can be regarded even as a moral consideration for a deed of gift, by his nephew Valabhdás, of his share to the defendant. But, further, in *Gangubái v. Bámánná* (a) a deed of gift of an undivided share in family property by a parcener to his daughter, where the only consideration was natural love and affection (which is a moral consideration), was held void as against his coparceners by Couch, C.J., Newton and Warden, J.J., in this Court. The authority of that case was recognized in *Vásudev Bhat v. Venkatesh Sanbhav* (b) and in *Udárám Sitárám v. Rámu Panduji* (c). In those cases the deeds upheld were executed for valuable consideration. We are not disposed to carry the assignability of the share of a coparcener in undivided Hindu family property any farther than we felt compelled to do by the precedents referred to in those cases, and by the traditions of the Supreme Court and Sadr Adálut in this Presidency.

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What has been said, shows that we cannot agree with the learned Subordinate Judge in supporting the deed of gift, even to the extent of the share of Valabhdás. We must, therefore, declare it to be void as against the original plaintiff and his son, the present plaintiff.

We think that the defendant has in her defence mistaken her rights. As the concubine of Gokaldás for many years, she is entitled to maintenance : *Khemkor v. Umiáshankar* (d); *Vyavahár Mayukha*, Ch. IV., S. 8, pl. 5; *Miták*. Ch. II., S. 1, pl. 7, 27, 28; 1 West and Bühler 92, 93; 1 Stra. 174. We must, therefore, although reversing the decree of the Subordinate Judge, direct him to ascertain what is a sufficient future maintenance for the defendant, commencing from the date of this decree. In so doing he should have regard to her age, her past mode of life, and the extent of the family estate inherited by the plaintiff and Valabhdás from Gokaldás. He should also take proper measures to secure that mainte-

(a) 3 Bom. H. C. Rep. 66 A. C. J. (b) 10 Bom. H. C. Rep. 139, 157.
(c) 11 Bom. H. C. Rep. 76, 80. (d) 10 Bom. H. C. Rep. 381.

1875. nance for her, either by directing an investment of a sufficient part of the estate in trust for that purpose, or by such other means as he may deem sufficient. The present plaintiff will, of course, be entitled immediately to the residue of the property, and on the death of the defendant to the portion set apart for the protection of her maintenance. Under the peculiar circumstances of the case we shall not award mesne profits or costs to the plaintiff. The parties must respectively bear their own costs of the suit and appeal. It being equitable that the plaintiff, in recovering from the defendant the property, should do so subject to the burden, placed upon it by Hindu law, of supporting the defendant, we have not thought it proper to subject her to the expenses of a separate suit for that purpose.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 450 of 1874.

July 1.

BHAVA'NI SADA'SHIV.....*Plaintiff and Appellant.*

BHAVA'NI MA'NA'JI*Defendant and Respondent.*

Act XI. of 1843—Civil Court's jurisdiction—Patilki Watan—Collector.

The plaintiff had two shares, and the defendant one in a *patilki watan*. In an action brought by the plaintiff to establish his right to officiate twice as often as the defendant,

Held that the plaintiff was not necessarily entitled to such right, though the fact of his holding two shares in the *watan* might be a reason for the Collector to exercise his discretion under Act XI. of 1843 (when it was in force) in favour of the plaintiff by assigning to him a longer period of management than to the defendant, in the event of the two sharers not agreeing as to the person to officiate.

Quære whether the Civil Courts have jurisdiction to entertain such a suit.

THIS was a special appeal from the decision of G. M. Macpherson, Senior Assistant Judge of Poona in charge of Solapur, affirming the decree of the Subordinate Judge of Pandharpur.

Bhaváni Sadáshiv brought this suit against Bhaváni Mánáji, and stated that he and the defendant were sharers in a certain *pátilki watan* consisting of three shares, of which the plaintiff held two and the defendant one, and that, therefore, the plaintiff was entitled to officiate as *pátil* twice as often as the defendant did. The defence was that the action was not maintainable, and that the defendant and plaintiff were appointed by the revenue authorities to perform the work alternately each year. Both the lower Courts threw out the plaintiff's claim as not maintainable in a Civil Court.

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SADA'SHIV
v.
BHAVA NI
MANAJI.

The special appeal was argued before WESTROPP, C.J., and LARPENT, J.

Bahiravnáth Mangesh for the appellant.

Mánikshá Jahángirshá for the respondent.

WESTROPP, C.J.:—Without deciding whether or not the Civil Courts have jurisdiction to entertain such a suit as the present, we are of opinion that, even if it be assumed that the Civil Court has such a jurisdiction, the plaintiff has failed to show any authority for his proposition, that, because he is entitled to two shares out of three in the *watan* appendant to the office of *Pátil*, he is, therefore, necessarily entitled to officiate twice as often as the owner of the third share in the *watan*. It might be a reason why the Collector, under Act XI. of 1843 (when it was law), if the two sharers could not agree as to the person to officiate, might have exercised his discretion in favour of the plaintiff by assigning to him a longer period of management than to the defendant; but we do not see that it was at all imperative on the Collector to have done so, or that the plaintiff has established any such right, either by custom or otherwise in himself as owner of two-thirds of the *watan*, to entitle him to a declaration from a Civil Court that he has a right to a double period of exercise of the office. We, therefore, affirm the decree with costs.

Note.—See, as to hereditary officers, Bombay Act III. of 1874.

[CRIMINAL JURISDICTION.]

1875.
July 6.

REG. v. TUKA'RA'M RA'GHO.

Offence not triable by Subordinate Magistrate—Power of District Magistrate to annul conviction—Criminal Procedure Code, Sections 284 and 297.

Where, on appeal from a conviction, by a Subordinate Magistrate, of an offence triable by him, the Magistrate of the district is of opinion that the evidence in the case establishes a graver offence against the accused not triable by the Subordinate Magistrate,

Held that the Magistrate of the district has no power to annul the conviction and sentence under Section 284 of the Code of Criminal Procedure, but should report the matter for the orders of the High Court.

THE following case was stated by W. M. P. Coghlan, Session Judge of Tháná, for the opinion of the High Court :—

“Tukárám Rágho was convicted by Mr. Shripat Pándurung, 2nd Class Magistrate, of intentionally outraging the modesty of a woman under Section 354 of the Penal Code. The prisoner appealed to the District Magistrate, who annulled the conviction and sentence in the following order :—

“The evidence recorded by the Subordinate Court in this case clearly goes to prove that appellant committed the offence with which he was charged. In the place of completing the evidence and passing sentence as he has done, the Magistrate should have submitted the proceedings in a case of this nature, in order to a more severe sentence being passed on the accused than that passed by the Magistrate, as the offence, if the evidence recorded is to be relied on, is one of attempting to commit rape (Sections 376 and 511 of the Indian Penal Code), and, as such, one calling for a severe sentence, and which the Subordinate Court is not empowered to try as beyond its competency.

2. “The Court accordingly annuls the conviction and sentence passed by the Subordinate Court, and directs a retrial of the case by the 1st Class Magistrate in charge of the Karjat Táluka, with which view the records, &c., are transmitted to that Court (Section 284 of the Code of Criminal Procedure).

3. "I am of opinion that this order was illegal, in that the 2nd Class Magistrate had convicted Tukárám Rágho of an offence triable by him, and that Section 284 of the Code of Criminal Procedure has no application to the case. *Reg. v. Chanverdyá* (5 Bom. H. C. Rep. 65 Cr. Ca.) appears to be in point, and shows that the District Magistrate's order was *ultra vires* as to Section 284 (corresponding to Section 427 of the former Code).

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4. "It seems from *Reg. v. Hiramón* (8 Calc. W. R. Cr. Rul. 30) that the Bengal High Court was of opinion that a Session Judge sitting in appeal may quash an illegal conviction and direct proceeding according to law; but however this may be, it does not bear on the present case, in which the conviction by the 2nd Class Magistrate was legal.

5. "It appears that the District Magistrate, on entertaining the opinion (as I gather from this order) that Tukárám Rágho ought to have been tried for attempt to commit rape, an offence not triable by the 2nd Class Magistrate, ought to have reported the matter to the High Court in order that the erroneous conviction might be quashed and a new trial ordered.

Quære—"Would it have been competent to the District Magistrate to confirm the 2nd Class Magistrate's conviction under Section 354, and then to have received a complaint of attempt to rape, and have committed for trial at the Sessions?"

6. "The alleged illegal action of the District Magistrate was argued to be a bar to the trial of the case, in that it invalidated the committal. I, however, held that, the committal being by a competent Magistrate, the Court was (Criminal Procedure Code, Section 197) bound to accept it."

The case was reviewed by KEMBALL and NA'NA'BHA'I, JJ.

KEMBALL, J., being of opinion that the District Magistrate had, and NA'NA'BHA'I HARIDA'S, J., that he had not power to annul the conviction by the Subordinate Magistrate, referred the point to WESTROPP, C.J., under Section 271 B of the Code of Criminal Procedure.

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July 1.—WESTROPP, C. J. :—The accused Tukarám Rágho was convicted by a Magistrate of the 2nd Class, under Section 354 of the Penal Code, of intentionally outraging the modesty of a woman, which is an offence within the jurisdiction of a 1st or 2nd Class Magistrate. The District Magistrate, on appeal by the accused, being of opinion that the facts in evidence before the 2nd Class Magistrate constituted the graver offence of an attempt to commit rape, annulled the conviction and sentence, the offence of an attempt to commit rape not being within the jurisdiction of the 2nd Class Magistrate. My brothers Kemball and Nánabhái Haridás, JJ.—having differed on the question whether it was within the authority of the District Magistrate to annul the conviction and sentence, or whether he, being of opinion that the offence actually committed was of a graver character than that of which the accused was convicted and beyond the jurisdiction of the 2nd Class Magistrate, ought to have referred the case to the High Court in order that it might be dealt with there—have referred the point to me under Section 271 B of the amended Criminal Procedure Code.

The question turns upon the construction of Section 284 of that Code, which provides that “when any Court has *convicted* a person of an offence not triable by such Court, the Appellate Court shall annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction.” The Appellate Court in this case was the District Magistrate; the offence of which the accused was convicted, was “intentionally outraging the modesty of a woman” which, it is not denied, is an offence within the jurisdiction of a 2nd Class Magistrate and, therefore, was triable by him. It may be that the facts alleged, if true, constituted an attempt to commit rape, which is not an offence triable by a 2nd Class Magistrate. But the 2nd Class Magistrate did not try the accused for, or convict him of that offence. Therefore I think that the District Magistrate had not any jurisdiction, under Section 284, to annul the conviction and sentence on the ground that the evidence, on which the accused was convicted, warranted a graver

charge than the 2nd Class Magistrate had authority to try. The decision in *Reg. v. Chanveráya* (5 Bom. H. C. Rep. 65 Cr. Ca.) of Newton and Tucker, JJ., on Section 427 of the former Criminal Procedure Code, which is similar in all respects to Section 284 of the present amended Code, agrees with my opinion. A *dictum* at the conclusion of the Court's remarks in the case of *Reg. v. Heeramun Singh* (a) is of an opposite character. But, on looking at the language of Section 427 of Act XXV. of 1861 and Section 284 of the present amended Criminal Procedure Code, I think it is explicit and cannot be extended so as to comprise such a case as the present.

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The difference in language between Clause 5 of Section 297 of the present amended Code and Section 284 of the same Code fortifies this conclusion. Clause 5 of Section 297 is that, "if the High Court considers that any person convicted by a Magistrate *has committed* an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court." Here we find the Legislature using much more comprehensive language when it clearly intended to give the power of annulling the previous proceedings, although the charge and conviction may have been within the jurisdiction of the trying Court. That power is here given irrespectively of the nature of the charge and conviction where the evidence leads the High Court to believe that the offence committed was graver than that charged, and for which the accused was convicted in the Court below.

The reply to the Session Judge of Tháná should, I think, be that the District Magistrate had not power to annul the conviction and sentence passed by the 2nd Class Magistrate, but should have referred the matter to the High Court.

July 6.—*Coram* KEMBALL and NA'NA'BHA'I HARIDÁ'S, JJ. :—The District Magistrate had not power to annul the conviction and sentence passed by the 2nd Class Magistrate, but should have referred the matter to the High Court.

(a) 8 Calc. W. R. 30 Cr. R.

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It should be pointed out to the Session Judge that he was wrong in holding that the committal, being by a competent Magistrate, he was, under Section 197 of the Code of Criminal Procedure, bound to accept it. When the Session Judge found the order of committal to be contrary to law, he should have reported the proceedings to the High Court, under Section 296 of the Code, with a view to getting it annulled.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 400 of 1874.

July 6.

SHA'PURJI JAHANGIRJI.....(*Defendant*) *Appellant.*

THE SUPERINTENDENT OF }
THE POONA CITY JAIL. } ... (*Plaintiff*) *Respondent.*

Limitation Act IX. of 1871, Schedule II., Clauses 63, 84, and 95—Suit on an indemnity bond—Fraud—Cause of action.

On the 27th July 1868 plaintiff received from defendant an indemnity bond, promising to indemnify plaintiff against the misbehaviour of a third person. On the 4th June 1870 the third person committed an act of embezzlement. In an action brought by plaintiff on the 28th June 1873 on the indemnity bond, the first Court held the claim barred under Clauses 63 and 84 of Schedule II., Act IX. of 1871. In appeal that decree was reversed, and the claim allowed under Clause 95 of the same schedule.

The High Court, on special appeal, *held* that Clauses 63 and 84, and not Clause 95, applied to the case; as the suit was one, not for relief on the ground of fraud, but for breach of a contract to indemnify against fraud.

THIS was a special appeal from the decision of H. Crowe, Assistant Judge of Poona, reversing the decree of Mahádev Govind Ránadé, 1st Class Subordinate Judge at the same place.

The special appeal was argued before WESTROFF, C.J., and LARPENT, J., on the 6th July 1875.

•Gándhibái Jhángirji Modé for the appellant.

Dhirájlál Mathurádás (Government Pleader) for the respondent.

The facts of the case fully appear from the judgment of the Court delivered by

WESTROPP, C.J. :—This suit has been brought by the Superintendent of the Poona City Jail upon a bond, given by the defendant on the 27th July 1868, to indemnify, to the extent of Rs. 4,000, the plaintiff against any embezzlement or other misbehaviour of Dorábji Hormasji Chinay, the gaoler. The latter, on the 4th of June 1870, embezzled a fine of Rs. 1,000 paid to him by one of the prisoners in his custody, and was, on the 21st November 1871, convicted and sentenced in respect of that offence. The plaint was not filed in this suit until the 28th June 1873. The defendant has pleaded the Limitation Act IX. of 1871 as barring the suit, it not having been brought within three years after the occurrence of the act of embezzlement on the 4th June 1870.

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The Subordinate Judge, Mr. Ránade, relying on Clauses 84 and 63 of Schedule II. of the Act, has held the plea to be good and the suit barred.

The Assistant Judge, relying on Clause 95 of the same schedule, has reversed the decree of the Subordinate Judge, and made a decree in favour of the plaintiff for Rs. 1,000, the amount claimed and costs.

The defendant has specially appealed to this Court against that decree.

We are unable to support the decree of the Assistant Judge.

Clause 95, on which he relied, provides that in suits "for relief on the ground of fraud" the three years' limit shall begin to run from the time "when the fraud becomes known to the party wronged". It is true that the fraud of the gaoler was the circumstance which entitled the plaintiff to call upon the defendant to indemnify him. But the cause of action is not the fraud itself, but the breach of the defendant's contract to indemnify the plaintiff. The suit, therefore, is one, not for relief on the ground of fraud, but for a breach of a contract to indemnify against fraud. And Section 19 of the Act strengthens our view as to the question whether Clause 95, Schedule II., was intended to be appli-

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cable to such a case as the present. Section 19 provides that "when any person having a right to sue has, by means of fraud, been kept from the knowledge of such right or of the title" on which it is founded, and where any document necessary to establish such right has been fraudulently concealed, the time limited for commencing a suit, (a) *against the person guilty of the fraud or accessory thereto*, or (b) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production." Here there has not been any allegation that the defendant was in any wise accessory either to the fraud of Dorabji, the gaoler, or to the concealment of it. And there is not any provision in Section 19 prolonging the right of suit against an innocent guarantor.

The case seems to us to come within the Clauses 63 and 84 relied upon by Mr. Ránade. Clause 63 provides that in a suit "upon a promise to do anything at a specified time or upon the happening of a special contingency, the period of limitation (three years) shall begin to run at the time specified or at the contingency happening". Here the contingency, viz., the act of embezzlement, occurred on the 4th June 1870, *i.e.*, 3 years and 24 days before the plaint was filed. Clause 82 provides for the case of a suit by a surety against the principal debtor; Clause 83, for a suit by a surety against a co-surety; and Clause 84 provides for the case of a suit "upon any other contract to indemnify", and prescribes that the three years' limit shall commence to run "when the plaintiff is actually damnified". Here the plaintiff was actually damnified on the 4th June 1870 by the act of embezzlement, and, as already observed, the suit has not been brought within three years from that time.

We must reverse the decree of the Assistant Judge, and dismiss the claim with costs of suit and both appeals.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 469 of 1872.

MAKANDA'S KA'LIDA'S and SHANKARDA'S
 DA'DA'BHA'I (Original Defendants) ... *Appellants.*
 SHANKARDA'S HARIBHA'I (Original Plain-
 tiff) *Respondent.*

1875.
 July 30.

'*Sán*' mortgage (mortgage without possession in Guzerát)—Registration
 Act XX. of 1866, Section 50.

Under Section 50 of the Registration Act XX. of 1866, a registered instrument takes effect as regards the property comprised therein against every unregistered instrument relating to it, whether or not the grantor of those instruments be the same.

As between himself and his mortgagor and also as against any subsequent unregistered assignee of the latter, an unregistered *sán* mortgagee in Guzerát has a perfectly valid charge upon the property mortgaged; but his right against such property is liable to be defeated by the mortgagor or his heir or such assignee conveying it to another by a registered instrument while his own title remains unregistered.

Lakhmichand v. Kastur (9 Bom. H. C. Rep. 60) dissented from.

Quære—Whether notice, to the purchaser, of the existence of a prior unregistered mortgage would in any way affect the provisions of the Registration Act.

THIS was a special appeal from the decision of J. W. Walker, Acting Assistant Judge at Ahmedabad, reversing the decree of the Ahmedabad Subordinate Judge.

The appeal was heard by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

Nagindás Tulsidás for appellants.

Dhirajlál Mathurádás (Government Pleader) for respondent.

The facts and arguments fully appear from the following judgment of the Court delivered by

NA'NA'BHA'I HARIDA'S, J. :—This suit was instituted by the plaintiff, Shankardás Haribháí, to have his right declared to sell, (in execution of a decree obtained by him against Lálá Valá,) a house situated in the village of Asláli, in the Ahmedabad District—the Subordinate Judge having ordered the

1875. attachment, placed thereon at the suit of the plaintiff, to be raised at the instance of Shankardás Dádábhái, the second defendant.

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The facts of the case, either found by the lower Court or not disputed, are as follows:—On the 7th of February 1867 the first defendant, Makandás Kálidás, obtained a money decree in a suit against Lálá Valá and his wife, but did not proceed to execute it until 1870. In the meantime, on the 26th April 1868, Lálá Valá, the owner, mortgaged the house in dispute to Jorá Ranchhod, who obtained possession of it under his deed of mortgage; and subsequently, on the 11th May 1869, Lálá Valá also *sán*-mortgaged the same house to Shankardás Haribhái, by Exhibit No. 27, in consideration of a sum less than Rs. 100. Subsequently, Makandás Kálidás, in execution of his above-mentioned decree of the 7th February 1867, attached the house as belonging to his judgment debtor, Lálá Valá, whose interest in it was accordingly sold by public auction to Kálidás, the father of Makandás, the first defendant, on the 3rd February 1870. On the 16th June 1870, Shankardás Haribhái, the present plaintiff, filed a suit upon his *sán* mortgage against Lálá Valá, whose interest in the house, as above stated, had already passed to Kálidás, and obtained an *ex parte* decree on the 5th July 1870. In the meantime, Kálidás by Exhibit No. 10 sold the house for Rs. 95 to the second defendant, Shankardás Dádábhái, on the 22nd June 1870, after having redeemed and recovered possession of it from Jorá Ranchhod. While in Shankardás Dádábhái's possession, as such purchaser, the house was attached by the plaintiff, Shankardás Haribhái, in execution of his *ex parte* decree against Lálá Valá, and that attachment was raised by the Subordinate Judge, as stated above, upon Shankardás Dádábhái's application under Section 246 of the Code of Civil Procedure. Hence this suit by Shankardás Haribhái to establish his right to sell the house in dispute in execution of his decree.

It is difficult to understand why Makandás Kálidás was made a party. The contest is really one between Shankar-

dás Haribhái and Shankardás Dádábhái, and the question we have to determine is, what are their respective rights?

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MAKANDA'S
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and
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The lower Appellate Court held that Kálidás having, at the Court sale, purchased only the right, title, and interest of Lálá Valá, Shankardás Dádábhái, the assignee of Kálidás, cannot be considered to have acquired anything more; and that as Shankardás Haribhái was entitled, as against Lálá Valá, to realize his *sán* lien by the sale of the house, he was equally entitled to do the same as against Shankardás Dádábhái who stood in Lálá's place. It is true that in Guzerát a *sán* mortgage—i.e., a mortgage not intended to be accompanied by possession—is perfectly valid even as against a subsequent purchaser. But there are important circumstances which do not appear to have been brought to the notice of the Assistant Judge, and which have a very important bearing upon this case. Both the *sán* mortgage, Exhibit No. 27, (which the plaintiff relies upon,) and the deed of sale, Exhibit No. 10, (which the defendant Shankardás Dádábhái relies upon,) are documents whose registration was optional under Clause 1, Section 18, of Act XX. of 1866, and relate to the same property, the house in dispute. One of them—the *sán* mortgage, though prior in date, is unregistered; while the other, the deed of sale, is registered in accordance with the provisions of that Act. Such being the case, the question is, what is the effect of Section 50 of the Act upon them? They were both executed after that Act came into force. The section runs thus:—"Every instrument of the kinds mentioned in Clauses 1, 2 and 3 of Section 18 shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not."

These words are very clear, and admit of only one construction. Unless, therefore, it is satisfactorily made out that Section 50 does not apply to the documents before us, we are bound to hold that the deed of sale, Exhibit No. 10, which has been "duly registered", shall "take effect, as

1875. regards the property comprised therein", against the plaintiff's "unregistered" *sán* mortgage, Exhibit No. 27, "relating to the same property".

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It was, indeed, argued by Mr. Dhirájlál Mathurádás for the respondent that Section 50 does not apply to these documents, inasmuch as they were not by the same grantor. But we do not find in the Act any indication that the Legislature intended to provide only for documents by the same grantor. The words of the section are wide enough to include documents executed by different grantors as well as those by the same grantor. Besides, it cannot, we think, be denied that *bond-fide* purchasers from the original owner's heirs or assigns require protection against secret or concealed conveyances and charges no less than those from the original owner himself, and that, therefore, their case is as much within the mischief the Act was intended to remedy. We must, accordingly, hold that it is not, by any means, necessary, under Section 50 of Act XX. of 1866, that the two rival deeds must have been executed by the same grantor; and in this view we are fortified by the decision of the House of Lords in *Warburton v. Lovelund* (a), where the same question arose upon the construction of a somewhat similar Irish Registration Act, 6 Anne, C. 2.

In that case the facts were as follow:—A term for years in land being vested in B for life, with remainder to E his daughter absolutely, B and E, on the marriage of the latter, conveyed, by a deed not registered, to trustees to the use of B for life, with remainder to W the intended husband for life, with remainder over. After the death of B, W being in possession conveyed by a deed which was registered; it was held by the House of Lords, in affirmance of the decision of the Court of Exchequer Chamber in Ireland, which had affirmed that of the Court of Exchequer, that the latter conveyance (a lease) was valid against E, who, after the death of W, claimed the term under the unregistered settlement. The Court of Exchequer Chamber had been equally divided on the question. The decision of the House of Lords was given in conformity with the unanimous opinion of the

(a) 6 Bligh, N. R. 1; S. C. 2 Dow and Clark 480, 1 Hudson and Brooke 623.

English Judges. It was in that case contended, on behalf of E, that the Irish Registry Act, 6 Anne, C. 2, applied only to cases of conveyance from the same person, and that, if this were not so, the registered conveyance of a mere stranger to the title might prevail against the unregistered conveyance of the true owner; and it was argued that W was a stranger to the title, if the unregistered settlement were laid aside. But this was denied by Tindal, C.J., who gave to the House the unanimous opinion of the English Judges. He said that, putting aside the unregistered settlement, the term for years would, on the death of B, have vested *jure mariti* in W, inasmuch as, independently of the unregistered settlement, his wife R was entitled to the term in remainder after the death of her father B, and that in right of E it would have vested in her husband W with full power in him alone to dispose of it, so he was no stranger to the title. Tindal, C.J., was careful to guard against any supposition that a mere stranger to the title could, by the operation of the Irish Registry Act, make a valid conveyance, and so also was Burton, J., in his judgment in the Court of Exchequer Chamber in Ireland. Referring also to the English Registry Act, 2 and 3 Anne, C. 4, the latter said: "It has never been supposed that, under that statute, a purchaser, by a registered conveyance from a mere stranger, could acquire a title by such a conveyance merely because another person, having a title, had theretofore conveyed it by an unregistered deed" (1 Hud. and Br. 637).

It was further argued that Lálá, after the *sán* mortgage to the plaintiff, had only the equity of redemption in him, and that, therefore, Shankardás Dádábháí could not be considered, by the simple act of registering his deed of sale, to have acquired any higher right; and the decision in *Lakshmichand v. Kastur* (b), which was cited to us, may, no doubt, be regarded as supporting such contention. But we are not prepared to follow that decision. Argument, similar to that addressed to us, was resorted to unsuccessfully in

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(b) 9 Bom. H. C. Rep. 60. See, as to the necessity for the registration of a certificate of sale, *Padu v. Rakhmai*, 10 Bom. H. C. Rep. 435. *Mulji v. Anupram*, 7 Bom. H. C. Rep. 136 A.C.J.

1875. *Warburton v. Loveland*. Besides, such argument would equally apply to every subsequent alienation by Lálá himself. Suppose he had sold the house after redeeming it from Jorá Ranchhod, and the purchaser had got his conveyance registered. It could not, we think, be contended that in that case the purchaser would not have got the house free from the unregistered *sán* charge. Suppose, again, that, having by a registered instrument let it for a term of years, he had only the reversion in him, which he sold, first to A for Rs. 50 by an unregistered deed, and then, before A took possession (c), to B for Rs. 99 by a registered deed. Here also the argument would equally apply. As between himself and A, the unregistered deed having conveyed the whole of his right to A, he would have nothing remaining in him to convey to B; and yet, as between A and B, the Registration Act distinctly provides that B's registered deed shall take effect as against A's prior unregistered one. To hold otherwise would be entirely to disregard and evade the clear provisions of Section 50 of that Act to the prejudice of registered purchasers whom the Legislature intended to protect. The position, then, of an unregistered *sán* mortgagee in Guzerát seems to us to be this.—If the mortgagee is one whose registration is optional, as between himself and his mortgagor, and also as against any subsequent unregistered assignee of the latter, he has a perfectly valid charge upon the property mortgaged; but his right against such property is liable to be defeated by the mortgagor, or his heir, or such assignee, conveying it to another by a registered instrument while his own title remains unregistered.

With reference to the case of *Lakhmichand v. Kastur*, already mentioned, it seems desirable to observe that the Privy Council in *Raja Enayet Hossain v. Giridhari Lall* (12 Moore's Indian Appeals 366, 378, 379, S. C. 2 Beng. L. R. 75 P. C. C.) held that there was no foundation, in principle or authority, for any distinction between the right of a person standing in the position of a claimant under an execution sale and a claimant under any other conveyance or assign-

(c) See 9 Bom. H. C. Rep. 121, 147.

ment. The struggle there was to obtain a preference for a claimant under an execution sale.

In this view of the matter we must reverse the decree of the Court below, and reject the claim with costs throughout.

We may observe that no question of notice or fraud arises in this case, as none such was ever suggested in the Courts below. We are not, therefore, called upon to consider whether notice on the purchaser's part of the existence of a prior unregistered charge would, in any way, affect the provisions of the Registration Act; nor, in the view we have taken of those provisions, is it necessary for us to express any opinion upon the point raised in the second ground of appeal to us, namely, whether Kálidás, having paid off Jorá's prior mortgage before the term of that mortgage had expired, did not thereby become an assignee of that mortgage, and, as such, entitled to resist the plaintiff's claim (d).

Decree reversed and claim rejected.

Note.—The ruling in this case was followed in S. A. No. 133 of 1873.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 12 of 1875.

LA'LBHA'I LAKHMIDA'S (Plaintiff) Appellant. September 23.

NAVA'L MIR KAMA'LUDIN HUSEN

KHA'N (Defendant) Respondent.

Certificate of sale—Registration—Practice.

The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale certificate dated 20th September 1865. The first Court decided against the plaintiff on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875 the plaintiff filed an appeal in the High Court against that decree, and on the 26th July 1875 applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related.

Held by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree.

(d) See *Itchárám v. Dayárárm*, 11 Bom. H. C. Rep. 41.

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1875. Distinction pointed out between this case and *Mohidin v. Mahádáji* (S. A. 437 of 1872).

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Quere—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it, in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate.

Quere—Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing.

THIS was a regular appeal from the decision of Makundrái Manerái, 1st Class Subordinate Judge at Surat, in suit No. 1062 of 1871.

The question raised and argued in this case was, whether the plaintiff, who brought his suit as purchaser under a certificate of Court's sale which was not registered, notwithstanding its registration was compulsory, should be permitted in appeal to give in evidence a new certificate of sale, relating to the same property, obtained and registered after the suit had been decided.

The appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 23rd September 1875.

Dhirájlál Mathurádás (Government Pleader) for the appellant contended that the new certificate of sale, issued on the 1st February 1875, and properly registered, ought to be received in evidence by the High Court. He cited *Mohidin v. Mahádáji* (S. A. No. 437 of 1872).

Nagindás Tulsidás and *Chundulál Mathurádás* for the respondent were not called upon.

WESTROPP, C.J.:—This cause was decided by the Subordinate Judge on the 11th November 1874, and he, amongst other grounds, made a decree against the plaintiff, because the two certificates of sale (Exhibits 2 and 3), dated the 20th September 1865, were unregistered. It is admitted by the pleader of the plaintiff that the decision of the Subordinate Judge on that ground cannot be impeached, it being fully supported by *Paulu v. Rakhmái* (a) and many other cases to

the like effect. The plaintiff's pleader, however, seeks by his *darkhást*, of the 26th July 1875, presented in this appeal, which was filed on the 9th February 1875, to retrieve his cause by asking permission to give in evidence new certificates of sale, issued on the 1st of February 1875, of the two villages the subject of this suit, and since registered, and cites the case of *Mohidin v. Maháláji* (S. A. No. 437 of 1872) decided in this Court on the 16th of June 1873. There the original certificate of sale had been lost, and the Sadar Amin granted to the plaintiff a new certificate of sale, which not only had been registered before the suit was brought, but also before the registration of the certificate of sale, which the defendant there relied upon. And in *Ládu Sáheb v. Irbassapa* (mentioned in that case) the new certificate of sale was, on the 4th October 1871, ordered by Melvill and Kemball, JJ., to be granted to the petitioner, because the original certificate had been detained, without his fault, in the Court of the Subordinate Judge until the time for registration had expired. Those cases, therefore, wholly differed in their facts from that with which we have to deal here. The original certificates of the 20th September 1868 have not been lost, and have been filed as exhibits and relied upon in this cause before the Subordinate Judge. The circumstance that they are unregistered, was wholly owing to the plaintiff's own fault, and not to that of any Court. We have strong doubts whether, under such circumstances, Mr. Barjorji Edalji, a Subordinate Judge, ought to have issued any new certificates of sale in order that the plaintiff might register them, he having lost by his own laches the right to register the original certificates. Howsoever that may be, the question here being whether the plaintiff had a title as purchaser at the time of the institution of this suit on the 10th of August 1871, we cannot permit him to give in evidence certificates of sale obtained and registered some years after the suit was commenced, and some months after it was decided. It is more than questionable whether, if they had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing, the Judge of first instance

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ought to have received them. We are quite certain that, issued, as they were, after he has made his decree, we ought not to receive them, nor ought we to suggest or facilitate any application to him for a review of his decree on documentary evidence that had no existence when he made it. We affirm that decree with costs.

Decree affirmed.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 556 of 1873.

Appeal No. 266.

July 3rd.

SORA'BJI	NASSARVA'NJI	} <i>Plaintiff and Appellant.</i>
DUNDAS		
THE JUSTICES OF THE PEACE		} <i>Defendants and Re-</i>
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		<i>spondents.</i>

Bombay Act II. of 1865—Ejectment—Limitation—Acquisition of land for public purposes—Compensation—Mesne profits.

Bombay Act II. of 1865, Section 240, does not apply to suits in the nature of an action of ejectment.

Acts relating to the acquisition of lands for public purposes must be construed strictly in favour of the subject.

The Court will not oblige the plaintiff in a suit in the nature of an action of ejectment to accept compensation.

Quere—Whether a claim to recover the mesne profits of land for which the plaintiff sues in ejectment comes within the provisions of Bombay Act II. of 1865, Section 240?

Price v. Khilat Chandra Ghose (5 Beng. L. R. Appx. 50) and the judgment of Phear, J., in *Poorno Chunder Roy v. Balfour* (9 Calc. W. R. 535 Civ. Bul.) approved.

THIS was an appeal from the decision of Sargent, J., dismissing a suit brought to recover possession of certain land of which the plaintiff alleged that he had been deprived by the defendants in 1868, and to recover the mesne profits of the same land received by the defendants.

Pigot and Purcell, for the appellant, cited *Poorno Chunder Roy v. Balfour* (a), and *Price v. Khilat Chandra Ghose* (b). 1875.

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Scoble, Advocate General, and *Lang*, for the respondents, cited *Lord Oakley v. The Kensington Canal Company* (c), *Whitehouse v. Fellcoves* (d), *Lloyd v. Wigney* (e), *Hardwick v. Moss* (f), *Newton v. Ellis* (g), *Poulsum v. Thirst* (h), and *Wilson v. The Mayor, &c., of Halifax* (i).

The facts of the case are fully set forth in the following judgment of the Court—WESTROPP, C. J., and GREEN, J.—delivered by

WESTROPP, C.J.:—The first paragraph of the plaint states that this suit is brought to eject the defendants from certain land of the plaintiff, and to recover the rents and profits thereof received by the defendants to the use of the plaintiff. The second paragraph contains the description and boundaries of the plaintiff's land. The 3rd and subsequent paragraphs, down to the end of the 7th, trace the title of the plaintiff from one Jamsetji Boga Modi in the year 1798. The 8th para. alleges that the plaintiff was in possession of the land from 1858. The 9th para. states that a portion of the plaintiff's land consisted of an open yard, not built upon, situate between the plaintiff's house and Rampart Row, and about 80 square yards in extent. The 10th and 11th paras. contain the following averments:—"In the month of February 1868 the Municipal Commissioner for the City of Bombay by his servants and agents broke and entered the said yard of the plaintiff, and fixed certain boundary marks therein. The said Municipal Commissioner in the month of July 1868, by his servants and agents without the plaintiff's consent and against his will, took possession of all the said yard lying within the said boundary marks, and proceeded to build certain stalls or

(a) 9 Calc. W. R. 535 Civ. Rul. (b) 5 Beng. L. R. Appx. 50.

(c) 5 B. and Ad. 138.

(d) 10 C. B. N. S. 765.

(e) 6 Bing. 489.

(f) 7 H. and N. 136.

(g) 5 El. and Bl. 115.

(h) 36 L. J. C. P. 225.

(i) 3 L. R. 114 Exch.

1875. shops thereon, and has kept the plaintiff out of the possession and enjoyment thereof, and has prevented the plaintiff, his family, and tenants, from having ingress and egress through the said yard to Rampart Row." The plaint then prays that the defendants may be ordered to quit and deliver up possession to the plaintiff of the piece of land containing 80 square yards, situate between the plaintiff's house and Rampart Row, and may be ordered to pay to the plaintiff the sum of Rs. 11,000 for mesne profits.

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The defendants by their written statement submit that the suit, having been instituted more than three months after the accruer of the cause of action, is barred under the provisions of Bombay Act II. of 1865 and Bombay Act III. of 1872, or one of them. They further contend that the so-called yard never was in the possession of the plaintiff or any of his predecessors in title, but was a piece of vacant ground in the possession and occupation of Government.

The case came on for hearing before Sir Charles Sargent on the 17th August 1874, when five issues were raised ; but the learned Judge, holding on the first of them, that the suit was barred, passed a decree in favour of the defendants with costs, without taking evidence or recording findings on the other issues.

Against that decree the plaintiff now appeals, and the arguments addressed to us have, of course, turned chiefly on the question of limitation. There can be no doubt that this suit is mainly in the nature of an action of ejectment, brought to recover possession of land, of which the plaintiff says he has been wrongfully dispossessed, and, as ancillary relief, seeks to recover the mesne profits received by the defendants from that land. The chief question is, whether the rule of limitation, contained in Bombay Act II. of 1865, Section 240, which was in force at the time of the seizure of the land by the Municipality (Section 287 of Bombay Act III. of 1872 is substantially identical with it), applies to suits in the nature of an action of ejectment, and for the decision of that question it has been necessary for us

to consider the whole Act. Section 240 is as follows :—“ No writ or process shall be issued against or served upon the Justices of Peace for the city of Bombay, or any of them, or the Commissioner, or any of his officers, or any person acting under the direction of the Commissioner, *for anything done or intended to be done under the powers of this Act*, until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Commissioner or at the place of abode of the intended defendant, stating with reasonable certainty the cause of such action, and the name and the place of abode of the intended plaintiff and of his attorney or agent in the cause ; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so delivered, and, unless such notice be proved, the Court shall find for the defendant ; and every such action shall be commenced within three months next after the accrual of the cause of action and not afterwards ; and if any person to whom such notice of action is given shall, before action brought, tender *sufficient amends* to the complainant, such complainant shall not recover in any such action when brought, and the defendant shall be entitled to be paid his costs as between attorney and client by the complainant ; and if no such tender shall have been made, it shall be lawful for the defendant in such action, by leave of the Court where such action shall be pending, at any time before issue framed, to *pay into Court such sum of money as he shall think fit*, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into Court.” Assuming, as we must, for the purposes of the present appeal that the plaintiff truly alleges the property to be his and to be wrongfully in the possession of the defendants, we have to decide whether the plaintiff is barred of his remedy because he has not given the notice or filed his suit within the time required by Section 240 of Bombay Act II. of 1865. Looking at the provisions of that section with respect to the tender of sufficient amends, and as to payment of money into Court, and also taking into consideration other sections of the Act, which we shall presently mention,

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1875. we think that Section 240 is not applicable to such a suit as the present, brought for the purpose of recovering possession of immoveable property. An action of ejectment is not brought to recover damages (sufficient amends) for an act "done or intended to be done" under the powers of Bombay Act II. of 1865. The present is not, in so far as it seeks restoration of the land, a suit to recover monetary compensation for a wrongful act, but to recover possession of property alleged to be that of the plaintiff, and, therefore, does not appear to be an action of the class contemplated by Section 240.

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Were we to hold that an action of ejectment is within the scope of Section 240 of Bombay Act II. of 1865, we should be ruling that, by mere seizure and wrongful possession for three months, immoveable property might be acquired by the Corporation. Sections 108 and 109 point out how the Corporation, if it desires to acquire the immoveable property of others, may lawfully do so. Section 108 runs as follows :— "The Commissioner may, with the sanction of the Justices, agree with the owners of any land for the absolute purchase thereof for the purpose of laying out and making new streets, or of widening, enlarging, or otherwise improving any of the public streets for any purpose whatever connected with the conservancy or general improvement of the city." And Section 109 says : "When there is any hindrance to the acquisition, by purchase, of any land or building required for the purposes of this Act, the Governor in Council, upon the application of the Commissioner, and after such inquiry as may be thought proper, may declare that the land or building is needed for a public purpose, and may order proceedings for obtaining possession of the same for Government, and for determining the compensation to be paid to the parties interested, according to any laws now or hereafter to be in force for the acquisition of land for public purposes. And the Governor in Council may vest such land or building in the Justices on their paying the compensation awarded." In the present case both parties agree that the land has been taken for a public purpose. It is not pretend-

ed that it has been purchased, and Section 109 provides that, where the Justices cannot agree with the owner of the land on the price to be paid for it, they can only proceed through Government. The Acts which enable Government to acquire land for public purposes ordain a special procedure, and it is not pretended that any such procedure has been resorted to in the present instance. One of the main objects of the notice required by Section 240 is to enable the Corporation to make compensation, and it is difficult to suppose that the Legislature intended to include a suit for the recovery of land within that section. There is nothing in that section to compel a person to accept compensation for land seized by the Corporation; nor is there in any statute, that we know of, any provision to the effect that, where wrongful possession is taken of land, the party suing to recover possession of his land should be compelled to accept compensation by money paid into Court. We are of opinion that this part of Bombay Act II. of 1865 only applies to those cases which are cases for compensation, and the Court never says, in a suit to recover possession of land, that it is a case for compensation. It must decide either that the plaintiff is entitled to have the land restored to him, or that he is not.

It is further to be noticed that in Acts of limitation care is always taken to provide for the cases of persons beyond the seas, or under disability, such as minority, coverture, and lunacy; but in Section 240 there is no such provision. We cannot believe that the Legislature intended that a minor, for instance, whose land had been seized by the Corporation, and who, by reason of his minority, was unable to sue for the recovery of it within the period specified in Section 240, should be deprived of all remedy.

Moreover, Acts relating to the acquisition of lands for public purposes must always be construed most strictly in favour of the subject (see 1 Boulnois Rep. 565; 9 Bom. H. C. Rep. 190, 191; 15 Q. B. 1045, 1046). The mode of acquisition, being distinctly laid down in Sections 108 and 109,

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1875. must be followed ; and we should require very clear words to that effect in a section so arbitrary as Section 240 before we could hold that it was intended to include a suit in the nature of an action of ejectment ; that is, that the Justices should be liable to suit only for three months in cases in which everyone else is liable for twelve years. We do not think that simple seizure and the lapse of three months was intended by the local Legislature to be a mode in which the Bombay Municipality may acquire lands ; such a provision would be monstrous. We are also of opinion that Section 243, which provides for the apportionment of compensation by the Court of Petty Sessions, is not applicable to a case of the acquisition of lands for public purposes.

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We refrain from expressing any opinion as to whether the claim to recover the mesne profits of the land can be sustained, or whether such an action comes within the provisions of Section 240, and is, consequently, barred in the present case. We think the question had better be left to be determined at the new trial, if the facts, as then established, render its determination necessary.

We are glad to perceive that the view taken of Section 87 of Bengal Act III. of 1864 by the High Court of Calcutta in the case of *Price v. Khilat Chandra Ghose* (j) supports our construction of Section 240 of Bombay Act II. of 1865. Phear, J.; also, in the case of *Poorno Chunder Roy v. Bal-four* (k) seemed to lean to the same opinion as that expressed by Loch and Hobhouse, JJ., in the case in 5 Beng. L. R.

The cases cited by the learned Advocate General as to the scope of the words "intended to be done" in Section 240 of Bombay Act II. of 1865 are not material, unless it can be shown that Section 240 embraces actions to recover possession of lands, and this, as we have already stated, it does not.

We are, therefore, of opinion that the decree appealed against must be reversed, and the case be remanded for a

(j) 5 Beng. L. R. Appx. 50.

(k) 9 Calc. W. R. 535 Civ. Ital.

re-trial on the merits. If the plaintiff succeed ultimately in recovering the land, he must have his costs of this appeal from the defendants. If he do not so succeed, the costs of this appeal must be costs in the cause.

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Order accordingly.

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Suit No. 760 of 1873.

Appeal No. 278.

IBRA'HIM BIN MAHA'SIN *Plaintiff.*
ABDUR RAHIMA'N BIN ALI *Defendant.*
HENRY GAMBLE, Official Assignee *Appellant.*
ABDUR RAHIMA'N BIN ALI *Respondent.*

September 10.

*Civil Procedure Code, Sections 106 and 119—Abatement—Notice—
Dismissal of suit—Limitation.*

Section 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff after the institution of a suit became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited,

Held that such order was irregular.

Held, also, that the Official Assignee, having notice of the order, was not entitled to further notice of the setting down of the suit for dismissal, he not having given the security required, and that the giving of such security was a condition precedent to his being made a party to the suit.

Where the suit was dismissed in accordance with the terms of the order mentioned above, and the Official Assignee did not apply, within thirty days of the passing of the order of dismissal, either to the Court making the order or to the Appellate Court, for its reversal,

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Held that an application to the Appellate Court for the reversal of an order discharging a rule *nisi* for the reversal of the order of dismissal, and for the restoration of the suit to the board for hearing, was barred.

AFTER the institution of the suit the plaintiff became insolvent, and his estate and effects vested in the Official Assignee. The defendant thereupon, on the 23rd June 1874, took out a summons in chambers, calling upon the Official Assignee and the insolvent to "show cause why the Official Assignee should not proceed with the suit, and give security for the defendant's costs, and, in default, why the suit should not be set down for dismissal." On the 27th June 1874 the order was made absolute in the following terms:—"Upon reading the Judge's summons, issued herein on the 23rd June 1874, and upon hearing Messrs. Crawford and Boevey, Attorneys for the defendant, in support of the said summons, and upon hearing Messrs. Hearn and Cleveland on behalf of the Official Assignee, and Assignee of the estate and effects of the plaintiff, an insolvent, I do order that the Official Assignee do, within fourteen days from the date of this order, give security for the defendant's costs in the sum of Rs. 1,000, and that he be made a party to this suit within one month from this date, and that, in default of such security for costs being given within the said period of fourteen days, this suit be set down for dismissal within eight days after the expiration of the time so limited, and that, in default of the Official Assignee being made a party to this suit within the said period of one month, this suit be at any time thereafter set down for dismissal." The Official Assignee did not give the security required, and the suit appeared on the board for hearing on 16th July 1874, when the defendant's counsel, before the suit was called on, moved for and obtained an order for the dismissal of the suit in the following terms:—"This Court doth order that this suit be, and it is hereby, dismissed, and this Court doth further order, that the plaintiff do pay to the defendant his costs of this suit when taxed." On 14th August 1874 the plaintiff's counsel obtained a rule *nisi* calling on the defendant to show cause why the order of 16th July 1874 should not be set aside, and the cause restored to

the board for hearing. This rule was discharged, after argument, on 31st August 1874. The Official Assignee then obtained a rule *nisi* on 22nd September 1874 calling upon the defendant to show cause why the order of 16th July 1874 should not be set aside, and the cause be restored to the board for hearing, and on 19th November 1874 this rule was also discharged. The present appeal was then preferred by the Official Assignee on 9th December 1874 against the order discharging the rule last mentioned.

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The appeal was heard by WESTROPP, C.J., and GREEN, J.

Scoble (Advocate General) and *Parcell* for the appellant.—The liberty given by the order of 27th June was to set down the cause for dismissal. This was clearly wrong, for that order was, on the face of it, framed in accordance with the provisions of Section 106 of the Civil Procedure Code, which contemplates, not the dismissal of a suit, but its abatement, so that it can be subsequently revived at any time not barred by the Limitation Act. If the Official Assignee had been a party to the suit prior to its dismissal, it might have been dismissed under Section 119, but in that case he would have been entitled to notice; as it was, he had none, and on 16th July the suit was dismissed. That order can only be held to have been made against the insolvent, for the Official Assignee not having then joined the suit, the order dismissing it cannot be said to have been made against him, nor, for the same reason, could he well appeal against it. The order of 27th June obliges the Official Assignee to be made a party, and allows a month for that purpose. The Civil Procedure Code contains no provision for the dismissal of a suit in which the Official Assignee ought to be the plaintiff but only for its abatement.

[WESTROPP, C.J. :—We certainly cannot hold “abate” to mean the same as “dismissed”. The meaning of Section 106 seems to us to be, that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit.]

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Mayhew and Inverarity for respondent.—We forego the costs awarded to us by the order of 16th July dismissing the suit. Marriott, J., discharged the rule for setting aside the order of 16th July. That order was based on the order of 27th June, which is still in force, and against which no application has yet been made. Of that order the Official Assignee had notice, for it was served on his attorneys. According to the terms of that order the Official Assignee should have given security within a fortnight. He did not do so, and it was on that ground that the suit was dismissed, and he did not apply within thirty days to have that order set aside. He had no right to be made a party till he had given security. We do not say that the order of 27th June is unimpeachable; but an order may be irregular, or even wrong, but it is not on that account a nullity. It must be regularly appealed against within the prescribed period, and in this case the time for making such an application as the present has expired.

Scoble in reply.—We admit having had notice of the order of 27th June, and that we cannot now ask the Court to interfere with it; but the order of 16th July is not justified by that order. We never acquiesced in having the suit set down for dismissal without the usual notice to which we were entitled according to the practice of the office.

[WESTROPP, C.J. :—Were you entitled to notice, not having given the required security within the prescribed time?]

Had we had notice we should have had an opportunity of pointing out the irregularity in the order of 27th June. That order does not expressly provide for giving us no further notice, and the usual practice is to give four days' notice when a suit is to be set down for dismissal. Instead, however, of giving us any such notice, the defendant comes in on 16th July, and asks for, and gets more than he is entitled to under the order of 27th June, viz., costs of the suit. Section 119 cannot apply, unless the Official Assignee has been made a party. In this case he has not, and, therefore, he is not affected by the order of 16th July, and, consequently, the thirty days' rule does not apply to him.

WESTROPP, C.J.:—We think that the order of 27th June 1874, providing for the dismissal of the suit, was irregular, and that, had the Official Assignee objected to it, he could have successfully resisted it. But he was not taken by surprise, for it is what the summons asked for and what was granted. Further, we think that fourteen days being named at the time of making the order as the period within which the Official Assignee should give security, and being accepted by Mr. Cleveland, after consultation with the Official Assignee, the Judge was justified in thinking that he assented on behalf of the Official Assignee, seeing that he was present and made no objection personally. As to setting down the cause for dismissal on 16th July without further notice, *cui bono* should notice be given, the Official Assignee having given no security? We do not think such notice was necessary, because the Official Assignee had not availed himself of the liberty reserved to him, by the order of 27th June, to come in within fourteen days. That order, no doubt, is clumsily drawn stating that the Official Assignee shall be made a party, though that were obligatory; but the latter part of the order shows, we think, that this was only conditional on security being given. Now, irregular as the order of 27th June was, the defendant doubtless went beyond it by taking on 16th July, not only the dismissal of the suit, but the costs. The defendant's counsel now consent to forego; but, even did they not, we very much doubt whether the fact of costs having been awarded to the defendant, would have been sufficient ground for reversing the order of Marriott, J. The Official Assignee made no application whatever to set aside the order of 27th June; he did not apply, within thirty days of the making of the order of 16th June to the Judge who made it, to have it set aside, nor did he appeal to us within thirty days for its reversal; so that, in whatever light the application is viewed, it must be held to be time-barred. The appeal must be dismissed; but, having regard to all the circumstances of the case, without costs.

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*Original Suit No. 698 of 1872.**Appeal No. 254.*1875.
June 18.HORMASJI TEMULJI *Appellant.*MA'NKUVARA'I *Respondent.**Attorney and client—Vendor and purchaser—Constructive notice—Secrecy—Practice—Costs.*

The Court will not presume notice to have been given to his client by an attorney where such notice would involve a confession by the attorney of a fraud practised by himself.

The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser.

Where the respondent had been guilty of such secrecy, the Appellate Court gave the appellant his costs in both Courts.

THIS was an appeal argued before WESTROFF, C.J., and GREEN, J., from the decision of Bayley, J., holding a purchaser to be affected with constructive notice of an existing mortgage. The facts of the case fully appear in the judgment.

Starling and Agnew Turner for the appellant.

Latham and Lang for the respondent.

WESTROFF, C.J. :—This is one of the cases arising out of the frauds of Pestonji Dinshá, who was admitted to practise, as a solicitor and attorney of this Court, on the 28th of August 1866. He had served his articles in the office of Messrs. Hearn, Cleveland, and Peile, where he certainly had an opportunity of learning better principles than those by which he seems afterwards to have been guided. On the 6th of June 1868 he purchased from the liquidators of a certain insolvent Parsi the general assets of the insolvent's estate, consisting of immoveable property and debts. Some members of the

insolvent's family now allege that Pestonji Dinshá purchased the property of the insolvent at their instigation, and for the purpose of giving to them a portion of the assets he might succeed in recovering, after recouping himself for the expenses to which he might be put. However that may have been, we find that, on the 4th September 1868, a mortgage of the immoveable property was executed to Mánkuvarbái by Pestonji Dinshá, who wished to raise the sum of Rs. 25,000 on that security. Mánkuvarbái's usual solicitors were Messrs. Hearn, Cleveland, and Peile; but in this matter, much against her own wishes and at the special desire of Pestonji Dinshá, who stated that it would be very damaging to his credit and would injuriously affect him in his business if it were known that he was borrowing money, she consented to employ as her solicitor Pestonji Dinshá, the mortgagor himself. At his desire, too, and for the same reasons, though greatly against her own wishes, she abstained from advertising the intended mortgage. The 4th September 1868 was the day appointed for the execution of the mortgage deed and the payment of the money to Pestonji Dinshá. At the time of the purchase of the property by him, the deed of conveyance, dated the 6th June 1868, was made out, not in the name of Pestonji Dinshá himself, but of his father, Dinshá Mánikji; in fact, Dinshá Mánikji was trustee for his son Pestonji Dinshá, and for the purposes of this suit Pestonji must be regarded as the owner of the equitable estate, for the claim advanced by the members of the family of the insolvent, from whose liquidators he purchased, is of so shadowy a nature that we cannot now take it into consideration. The mortgage to Mánkuvarbái ought, therefore, to have been drawn up, making Dinshá Mánikji, the principal conveying party, and Pestonji Dinshá, as owner of the equitable estate, party of the 2nd part. This, however, was not done, and the mortgage deed was made out in the name of Dinshá Mánikji alone. On the 4th September 1868 the mortgage money was taken to Pestonji Dinshá's office before 5 P.M. by two persons, of whom one was Mánkuvarbái's general manager, and the other occasionally acted in the capacity of her

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legal adviser, and both were previously acquainted with Pestonji. It is in evidence that Dinshá Mánikji was in the habit of sitting in his son's office, and assisting in the work there during office hours. On this occasion, however, he was not forthcoming, and Pestonji said he had gone on board a steamer that day starting for Kurrachee. At Pestonji's suggestion the parties bringing the money accompanied him to the Apollo Bunder for the purpose of obtaining the execution of Dinshá Mánikji to the mortgage deed; but, on arriving at the bunder, they found neither the steamer nor Dinshá Mánikji. Pestonji Dinshá then said that he held a power of attorney from his father, by virtue of which he could execute the mortgage deed. He accordingly took the others back to his office, where he produced a paper which he said was the power of attorney. He, however, did not read it to them, nor even open it, but threw it down on the table, where Mánkuvarbái's agents allowed it to lie unopened, apparently satisfied with Pestonji Dinshá's assertion that it was the power of attorney, and neither of them read it or asked to have it read to them. There is no evidence, beyond that of Mánkuvarbái's two agents deposing to the fact of Pestonji Dinshá's assertion at the time, that the paper was a power of attorney. Pestonji Dinshá might have been called as a witness to speak to this, but we can understand the unwillingness of either side to call him. However, the fact remains that there is a total absence of any evidence of the existence of any power of attorney. The mortgage deed was then executed by Pestonji Dinshá, who signed it in the following form, "Pestonji Dinshá attorney for Dinshá Manikji." The disappearance of Dinshá Mánikji seems to point to the suspicion that he was purposely kept out of the way to admit of the property being dealt with, as it was in fact afterwards dealt with, and to allow an opportunity to raise money twice on the same property, first by mortgage, and afterwards by sale. It is to be noticed that there was very gross negligence on the part of Mánkuvarbái's agents both in not inspecting the power of attorney, and also in taking Pestonji Dinshá's word for it

that there were no title deeds, which in fact there were. The mortgage deed was not lodged for registration until December of the same year, and the delay was at the request of Pestonji Dinshá, on the ground that his father might return from Kurrachee. However, the deed was ultimately lodged for registration on the 24th December 1868; but Pestonji Dinshá was not required to acknowledge his execution, and no summons was issued to compel him to do so until April 1870, and on the 5th May 1870 he did acknowledge the execution. Another curious circumstance is that, although Mánkuvarbái's agents knew that Dinshá Mánikji had returned from Kurrachee before they had succeeded in obtaining Pestonji Dinshá's acknowledgment of the execution of the mortgage deed, yet they had no communication with him either about the deed or the power of attorney. This was negligence, which largely contributed to the fraud.

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On the 11th January 1869 Dinshá Mánikji, in whom the legal estate was vested, executed a bargain paper to the appellant, Hormasji Temulji, agreeing to sell him a house, part of the property included in the mortgage deed of 1868. Hormasji, before concluding this transaction, advertised the intended purchase in the *Times of India* of the 1st February 1869, and in a Guzerati paper of the 2nd February 1869. He was guilty of no attempt at secrecy. Mánkuvarbái's manager saw neither of these advertisements, but that was not Hormasji's fault.

On the 2nd March 1869 a regular conveyance of the house by Dinshá Mánikji was executed to Hormasji, and was registered on 31st March 1869; so there was no delay on his part. The fact of the registration of the conveyance shows that Dinshá Mánikji might have been brought to the Registrar's office to acknowledge the execution on his behalf by Pestonji of the mortgage deed of 1868, had he been pressed to do so. At the time of the execution of the conveyance by Dinshá Manikji the title deeds of the house were handed over by him to Hormasji at Pestonji's office, and in the presence of Pestonji.

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On the 9th February 1871 M'ankuvarbái first became aware of Hormasji's claim through a letter written by his solicitor. There is no doubt that Hormasji paid his purchase money. So we have two parties here who have paid their money, and we are now asked by the first purchaser to apply to the second the doctrine of constructive notice; for it is admitted that Hormasji had no actual notice. The ordinary doctrine is, no doubt, that if a solicitor is mortgagor himself, or is solicitor for a mortgagor, and so is aware of the existence of a mortgage, and afterwards becomes solicitor for a purchaser, that purchaser is affected by the knowledge of his solicitor. Of course, there are certain exceptions recognized in equity, but that is the general rule. When the parties are equally innocent, the purchaser is taken to have the knowledge of his solicitor.

There is a case, *Kennedy v. Green (a)*, in which Lord Brougham refused to affirm that the solicitor must be taken to have communicated his own fraud to the purchaser. Now, we are strongly inclined to think that case would be applicable on the present occasion, because here was a double fraud on the mortgagee: first, the statement that there was a power of attorney, and that there was a legal estate being conveyed to her; and, second, the assertion that there were no title deeds, which there were. Coupled with this there was gross negligence on the mortgagee's part in not looking at the alleged power of attorney, and accepting without question the assertion as to the non-existence of title deeds. But it is not on the authority of that case that we decide; we decide on the ground of the secrecy preserved by the mortgagee.

We think that the doctrine of constructive notice is only to be resorted to where the parties are on a level in equity, and that it is a doctrine not to be extended, and we decline to presume notice in favour of a person who contributed to make the transaction secret. M'ankuvarbái employed her solicitor for the very purpose of concealment. Further,

(a) 3 M. and K. 699.

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though she knew of the practice of advertising, she did not avail herself of it. Again, she delayed lodging her deed for registration until the 5th May 1870. Now, if the purchaser had gone to search the register before that date, he would not have found any record of the mortgage, as the deed was lying in Pestonji Dinshá's office, and was not registered until after Hormasji was in possession of the property and had his conveyance registered. Under these circumstances we think that we should be acting inequitably if we presumed notice to Hormasji of a transaction which Mánkuvarbái had done everything in her power to keep secret. It is against all probability that the solicitor would ever communicate to Hormasji the previous transaction.

It is impossible to say that these parties stand on an equal footing. Hormasji has done everything above board, and Mánkuvarbái has done everything to maintain secrecy. That secrecy in such a transaction will militate against a party to it, is clear: *Sharpe v. Foy (b)*, which in one respect is a stronger case than this, for there the secrecy of the defendants was in the very matter in which they sought to affect the mortgagee with constructive notice; but the principle is there admitted that, if the secrecy is contributed to by the party who seeks to apply the doctrine of constructive notice, the Court will refuse to apply it. It is quite manifest that Mánkuvarbái concurred with Pestonji Dinshá in rendering the transaction secret as far as she could, and that Hormasji was induced to enter into the transaction in consequence. Under these circumstances we must reverse the decree of the Court below, and with costs, inasmuch as we think that the conduct of Mánkuvarbái has led Hormasji into the trouble which has reduced him to pauperism, and that it would be a very great hardship if he were not recouped his expenses throughout this litigation.

Decree reversed with costs.

(b), L. R. 4 Ch. Ap. 35.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 478 of 1873.**Appeal No. 273.*1875.
August 14.**E. SARSTEDT and another ... (Plaintiffs) Appellants.****THE AGRA BANK, LIMITED... (Defendants) Respondents.**

Regimental Debts' Act 1863, 26 and 27 Vic., C. 57, Sections 3, 4, 5, 6, 7, 8, 10, 12, 22, and 35—Royal Warrant, Clause 17—Committee of Adjustment—Notice—"Person"—Bona fides.

The president of a committee of adjustment, appointed under the provisions of 26 and 27 Vic., C. 57 (Regimental Debts' Act, 1863), wrote to the bank a letter enclosing the order by which the committee had been appointed, stating that he had given over to the widow of a deceased officer the whole of the estate of her husband by direction of the Military Secretary to Government, and requesting the bank to conform to her instructions concerning the amount of deposit receipts then in charge of the bank in the name of the deceased officer. The widow had taken out no letters of administration to the estate of her husband, nor had she a preferential claim or any preferential charge against it, but she paid all the preferential charges. On receipt of the letter from the president of the committee of adjustment, the bank paid over all the moneys of the deceased officer in their hands to his widow. In a suit brought against the bank by the first plaintiff, (the grand-daughter of the deceased officer,) who had taken out letters of administration to his estate on 6th June 1873, and her husband, the second plaintiff, to recover two-thirds of the moneys so paid by the bank to the widow with interest,

Held that on the payment, by the widow, of the preferential charges, the whole of the property remaining in the hands of the committee was "surplus," within the meaning of Section 5 of the Regimental Debts' Act of 1863, and that, assuming the Agra Bank at Bombay to be "within the command," within the meaning of Section 7, the moneys of the deceased officer in the hands of the bank, as being part of such "surplus," should have been dealt with by the committee in accordance with the provisions of Section 10 of the Regimental Debts Act 1863 and Clause 17 of the Royal Warrant, and should have been remitted to the Military Secretary to Government.

Held also that the Military Secretary to Government had no authority to pay or order the payment of such "surplus" to any person except in accordance with the provisions of Section 12 of the Regimental Debts Act of 1863.

Held also that Section 8 of the Regimental Debts' Act of 1863 did not render it incumbent on the widow, for the purpose of ousting the jurisdiction of the committee of adjustment, to pay the preferential charges before the committee had taken any steps under Section 7. The true construction of Section 8 is that, on payment of the preferential charges, the committee of adjustment

must be regarded as *functi officio*, except for the purpose of reporting, and should make over whatever property they have, which comes under the denomination of "surplus," in accordance with the terms of Section 10.

Held also that the letter of the president of the committee of adjustment was a sufficient notice to the bank that the committee were *functi officio*, and that the period had arrived when the civil law stepped in to regulate the case.

Quære—whether the bank could be held to be a "person" within the meaning of Section 22 of the Regimental Debts Act of 1863; but, even if it could,

Held that the bank were not protected by that section, the payment by them not having been made to a "representative" as defined in the Act.

Held also that the bank were not protected by Section 35 of the Regimental Debts Act, the payment not having been made "in pursuance" of the Act, and the carelessness of the bank in paying the money having been such as to amount to positive negligence, and debar them from pleading that they acted under the *bond fide* belief that the payment was made in pursuance of the Act.

Pemberton v. Chapman (7 Bl. and Bl. 210) distinguished.

JOHN Osborne, an Honorary Ensign in the Bombay Army, and Deputy Assistant Commissary of Ordnance, died intestate at Neemuch on 21st December 1868, leaving him surviving his widow and a grand-daughter, the first plaintiff, then an infant and unmarried. At the time of his decease there were standing in his name in the Agra Bank various sums of money, aggregating about Rs. 4,000, there deposited by him from time to time on deposit account at five per cent per annum. On the day of his death, 21st December 1868, a committee of adjustment was appointed under the provisions of the Regimental Debts' Act 1863, 26 and 27 Vic., C. 57, and proceeded to take steps for securing the effects of Mr. Osborne. On 12th January 1869 the president of the committee wrote the following letter to the Manager of the Agra Bank:—"I have the honour to inform you that I have, by direction of the Secretary to Government in the Military Department, given over the whole of the estate of the late Ensign John Osborne to his widow, Mrs. Maria Osborne, whose signature is attached, and request you will conform to any instructions she may give you concerning the amount of deposit receipts, &c., you have in charge in the name of John Osborne." Enclosed in this letter was

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1875. the order appointing the committee. Mrs. Osborne took out
 E. SARSTEDT no letters of administration to the estate of her husband, but
 AND ANOTHER paid all the preferential charges. On receipt of the letter of
 v. the president of the committee, the Agra Bank paid over to
 THE AGRA Mrs. Osborne all the money in their hands standing in the
 BANK, LD. name of the deceased John Osborne on deposit account.
 This suit was brought by John Osborne's grand-daughter,
 Elizabeth Sarstedt, (who had taken out letters of administra-
 tion to the estate of her grand-father on 6th June 1873,) and her husband, to recover from the bank two-thirds of the money so paid over by the bank to Mrs. Osborne, together with interest at 5 per cent per annum. The suit came on for hearing originally before Sir C. Sargent, J., who passed a decree in favour of the defendants with costs on the 28th September 1874. Against this decree the plaintiffs appealed, and the appeal was argued before WESTROPP, C.J., and BAYLEY, J.

Scoble, Advocate General (with whom was *Pigot*), for the appellants.—Under the provisions of Section 8 of the Regimental Debts' Act (a) the widow having paid the preferential charges, the committee of adjustment were not entitled further to interfere in relation to the property of the deceased, and, therefore, the letter of 12th January 1869 was not a valid authority to the bank to pay over any money of the deceased in their hands to the widow.

(a) Provided that if the representative of the deceased, or his widow (if any), or any of his next of kin, pays in full the preferential charges, the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the death, the committee of adjustment may and shall, without any representation taken out, and as if they were the representatives of the deceased, and to the exclusion of all other authorities and persons whomsoever, sell or convert into money such parts of the effects of the deceased as do not consist of money,—and also, where the death occurs out of the United Kingdom, get in and give receipts (which shall be effectual discharges) for all or any of the credits forming part of the estate of the deceased, and being payable or recoverable in India or in the colony, or possession, in which the deceased was quartered (as the case may be), and, if they think fit, sue for and recover any of such credits—and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the preferential charges and secure the surplus of the effect, or effects and credits, as the case may be, remaining over after all such payments.

Inverarity (*Farran* with him) for the respondents.—There is no evidence that the widow did pay the preferential charges, and, if she did, it was not such payment as is contemplated by Section 8 of the Act, for the proviso at the commencement of that section refers back to Section 7, so that to oust the jurisdiction of the committee the payment by the widow of the preferential charges should have been made immediately on the death of her husband. The committee had power on 12th January 1869 to claim payment themselves of the money of the deceased deposited with the bank. The payment by the bank to Mrs. Osborne was not a payment to her *qua* the widow of the deceased but *qua* the agent of the committee. Possibly the committee may be responsible, but not the bank. Even if the committee were acting *ultravires* in ordering the payment to the widow, the bank, on receiving the letter of 12th January, signed by the president in his character of president of the committee, and enclosing the order appointing the committee, were entitled to presume that the committee were acting within their powers, and were justified in paying the money of the deceased in their hands to the widow or any one else empowered by the committee to receive it, without seeing to the application of it: *Pemberton v. Chapman* (b). If the bank had been put upon enquiry by receipt of the letter of 12th January, they would only have referred to Sections 6 and 22 of the Regimental Debts' Act, and there is nothing in the letter to lead the bank to suppose that any of the conditions in either of those two sections had not been complied with. Act XIV. of 1873, Sections 5 and 6, in substance reproduce Section 8 of the Regimental Debts' Act. The policy of both these enactments is the speedy collection of the estate, and this policy would manifestly be defeated if a debtor were to be allowed to question the authority of the committee to receive payment themselves or to order it to their nominee. Section 35 of the Act protects the bank as well as the committee.

Scoble (Advocate General) in reply.—The report of the committee of adjustment shows that the widow did pay the pre-

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ferential charges, and there is no evidence to the contrary. From the terms of the letter of 12th January 1869 it is clear that the payment was made to Mrs. Osborne *qua* the widow of the deceased and not *qua* the agent of the committee. In fact, the letter amounts to a notice that the committee is *functi officio*, and is rather a request than an order; the bank, therefore, could not avail themselves of any protection of which the committee might have availed themselves before they had concluded their duties, but ought to have insisted on the widow taking out letters of administration to the estate of her husband before they made over to her any of his property in their hands.

WESTROPP, C.J.:—This suit is brought by Elizabeth Sarstedt and her husband to recover from the Agra Bank certain moneys which were deposited there by John Osborne in his life-time. John Osborne was an honorary ensign in the Indian Army, and held the appointment of Deputy Assistant Commissary of Ordnance at Neemuch, and in our observations regarding him the fact must be borne in mind, that he belonged to Her Majesty's Indian Army as distinguished from Her Majesty's Army at large—a distinction which is taken in the Regimental Debts Act 1863. Elizabeth Sarstedt is the administratrix of John Osborne, who appears to have died intestate. She was his grand-daughter, and at the time of his death she would appear to have been a girl, and unmarried, in the school at Byculla. John Osborne had a wife, who would appear to have been his second or third wife, but not the mother of Mrs. Sarstedt's mother. John Osborne's death occurred on the 21st of December 1868. No doubt, if the widow had applied for letters of administration to this Court, she could have obtained them, but she seems never to have made any such application. Therefore she was not armed with such authority as the ordinary civil law would confer on her to give an acquittance to the Agra Bank for this money. The bank, however, as a matter of fact, did make over the whole of the money to her on some date subsequent to the 12th January 1869, and they seek to defend themselves against this claim

by saying that they paid the money to her by order of the committee of adjustment, which assembled on the death of John Osborne under the Regimental Debts' Act 1863. The question is, whether the committee of adjustment had any authority to give such a direction as they did. It was not contended that the widow held what is called a preferential claim, or had preferential charges upon the estate of John Osborne, either to the extent of the money paid her by the bank, or to any other extent, or that he was in any way indebted to her. The report furnished by the committee to Government, which has been put in evidence here by the plaintiffs, states that the preferential charges had been all paid by the widow. I do not know that it is a very material circumstance in this case whether they had been so paid by her or whether they had not, because, even if they had been paid by her, we fail to perceive the authority in the Act for making over this property to her. My impression is, that, in the absence of evidence to the contrary, we ought to take it that the committee had performed their duty as they stated they had done, and that the preferential charges were paid. What these preferential charges are, is stated in the 4th section of the Regimental Debts' Act 1863. They are payable in preference to all other debts and liabilities, and are [1] expenses of last illness and funeral; [2] military debts, namely, sums due in respect of quarters, mess, band, and other regimental accounts, military clothing, appointments and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death, including sums due to any agent or to any paymaster, quartermaster, or other officer, on any such account, or on account of any advance made for any such purpose; to which shall be added, where the death occurs out of the United Kingdom, [3] servants' wages, not exceeding two months' wages to each servant; [4] household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period. "The surplus only," the 5th section states, "of the personal property of an officer or soldier dying on service, remaining over after payment of

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1875. preferential charges, shall be considered personal estate of
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 AND ANOTHER or of any other tax or percentage, or for any of the purposes
 v. of administration or distribution," so that that section is
 THE AGRA important in this way, showing that the surplus means
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 ment of preferential charges. If, therefore, we take it that
 the whole of the preferential charges were paid by the widow
 as we are bound to take it [in accordance with the evidence
 contained in the report of the committee], the whole of the
 property remaining in the hands of the committee was
 surplus. Now, the next section to which it is important to
 refer, is Section 7 : it says that, "immediately on the death of
 an officer or soldier on service, such committee of officers as
 may be prescribed by Royal Warrant, according to the
 circumstances of different cases, hereinafter called the
 Committee of Adjustment, shall secure all such of his effects
 as, where the death occurs in the United Kingdom, are in
 camp or quarters : and where the death occurs out of the
 United Kingdom, are within the station, colony, or com-
 mand." Now, we are willing to assume for the defendants, for
 the purposes of this case, that this money lying in the Agra
 Bank in the city of Bombay was within the command, and was
 such property as the committee of adjustment might have
 secured under this section. The committee, it appears, on
 the 23rd December 1868 wrote to the Military Secretary to
 Government, Colonel Macdonald, to ascertain whether, on the
 widow paying the preferential charges, the property of the
 deceased, John Osborne, might be made over to her, and were
 informed in reply by the Military Secretary to Government
 that that could be done. Now, we fail to find any authority in
 the Act for doing what the Military Secretary to Government
 informed the committee of adjustment might be done. We
 think that the contention that the property in the hands
 of the committee of adjustment, inasmuch as they had not
 paid the preferential charges, could not be regarded as sur-
 plus, is not sustainable. We think that the whole of the
 property in their hands, after the preferential charges were

paid by them or the widow or the next of kin, would be surplus, and being surplus must be disposed of as the Act directs. The 10th section states how the surplus is to be disposed of. It is this :—"The Committee of Adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such paymaster or officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information as may be prescribed by Royal Warrant." Then we turn to the Royal Warrant. The clause of the Royal Warrant applicable to such a case as the present is Clause 17, which is as follows :—"Where the death occurs in India, the deceased not being a soldier of Her Majesty's Army"—(which was the case here ; he was in Her Majesty's Indian Army ; the distinction is taken throughout the Act)—"the Committee of Adjustment are to remit the surplus to the Military Secretary to the Government of the Presidency in which the deceased was quartered." Then it may be said that they being so directed by the Royal Warrant, if the Military Secretary authorized the payment of this money to the widow, that would be a sufficient protection to the Agra Bank for paying to her the money in their hands ; but the answer to that is, that what the Military Secretary has to do, is expressly provided by the Act. It is in Section 12. We here find the same term "or other officer or person" as is used in the 10th section. This is what the 12th section says :—"Where the death occurs in India, the deceased not being a soldier of Her Majesty's Army, the following provisions shall take effect :—(1) The paymaster or other officer" (that is, the Military Secretary) "or person aforesaid shall, as soon as may be, after receiving the surplus aforesaid, publish such notice (stating the amount of the surplus, and other particulars respecting the deceased and his property,) as may be prescribed by Royal Warrant, together with a notice stating that all claims by creditors against the property of the deceased are to be lodged with such paymaster or other officer or person, who shall retain the surplus for two months after the first publication of such *Gazette* notice aforesaid, and

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1875. shall receive and record all claims lodged with him accordingly. (2) If claims are so lodged, not exceeding in the whole such absolute amount or such proportion of the surplus as may be prescribed by Royal Warrant, according to the circumstances of different cases, then such paymaster or other officer or person shall, at the expiration of the said two months, proceed to discharge the demands of the claimants who have lodged claims with him, unless under the special circumstances of the case of the deceased it appears to him inexpedient or unjust to do so" (but nothing of that kind seems to have been done in this case by the Military Secretary). " (3) In that case, or in case the claims lodged exceed in the whole the absolute amount or the proportion aforesaid, then such paymaster or other officer or person shall, without discharging those claims, or any of them, transfer the surplus aforesaid to the Administrator General for the Presidency. (4) Where such paymaster or other officer or person does not so transfer the surplus, he shall dispose thereof, or of so much thereof as remains after the discharge of any claims, as follows :—Where the amount exceeds £100, he shall pay it over to the representative of the deceased in India, if any; where the amount does not exceed £100, it shall not be necessary for any purpose that representation to the deceased be taken out in India, but if representation is taken out there, such paymaster or officer or other person shall pay the amount over to the representative in India; where the amount does not exceed £100, and representation in India is not taken out, such paymaster or other officer or person shall dispose of the amount, or part thereof, in India, (in such manner as may be prescribed by Royal Warrant for such cases,) for the benefit of the widow and of the children or other near relatives (if any) of the deceased, or of some of such persons, being in India." It is very clear that the Military Secretary, or paymaster, or other officer, where the assets exceed £100, has no authority to make any payment either to the widow or next of kin unless they are creditors, and here the assets did considerably exceed £100. They seem to have

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amounted to about Rs. 16,000. There was not that amount in the bank, but the bank had upwards of Rs. 4,000 belonging to the deceased. We do not find that the Military Secretary has in any respect followed the course prescribed for him. We have no evidence that he published any notice, no evidence that he proceeded to discharge the demands of the claimants, and we have no evidence that he made the moneys over to the Administrator General: in fact he did not. That would seem to have been his proper course if he had assets in his hands which he had not applied in payment of debts. The very provision that, in cases where the assets were less than £100, payment might be made by the proper authority to the widow or next of kin, is an exclusion of the right to make such payment in any other case, unless they claim as representatives. I now go back to Section 8. The argument is that, unless the preferential charges are paid immediately on the death by the widow or next of kin, and before the committee of adjustment have taken any steps under Section 7, they will not be bound to retire from the representation, but that does not appear to us to be the true construction of Section 8. We think that whenever the preferential charges are paid, the intention of Section 8 is that the committee of adjustment shall not further interfere in relation to the property. Now, the word "further" has been relied upon as referring expressly to Section 7, but the word "interfere" is coupled with it, and "interfere" is a word of very wide extent. It would include either a collection of assets or a distribution of assets; either would be an interference, and we think that, as soon as the preferential debts had been paid, the committee of adjustment must, except for the purpose of reporting, be regarded as *functi officio*, and that they ought then to have made over whatever property they had, which would come under the denomination of surplus, to the Military Secretary to Government. We have already stated that the Military Secretary is the "other person" pointed out by the Act. There is no authority for him, when the assets exceed £100, to pay to the widow or next of kin except upon letters of administration, probate, or certificate

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of administration—some authority, in fact, which is sufficient. However, it is said that this Act is so very obscure and ambiguous that, inasmuch as the committee of adjustment appear to have been acting up to the 13th of March 1869, the date on which they sent in their report, that fact would entitle us to suppose that the committee were authorized to direct the application of the money in the hands of the Agra Bank for such purposes as they might think proper, and that, if both parties acted *bonâ fide* (and there was no reason to suppose the contrary), the bank would be justified in paying the money over by order of the committee of adjustment. Now, we do not think that that is a sound argument. We think that the very fact, that such a letter as that of the 12th January 1869 was written by the president of the committee to the bank, was sufficient to warn the latter that the period had arrived when the civil law stepped in to regulate the case; notifying, as it did, that the committee had denuded themselves of the property of the deceased completely, and made it over to the widow. It is true that they said they did so under the authority of the Military Secretary to Government, but he had no power under the circumstances to confer such authority, and they had nothing left on which they could operate. The mere fact that their report remained unmade, did not leave them an existing body for the purpose of dealing with the assets. Section 22 has been relied upon for the protection of the bank in connection with the order of the Military Secretary. This section is as follows:—“Any property of an officer or soldier dying on service coming, under this Act, to the hands of any paymaster or other officer or person, shall not, by reason of so coming, be deemed assets or effects at the place in which that paymaster or other officer or person is stationed or resides, and it shall not be necessary by reason thereof that representation should be taken out in respect of that property for that place. When, under this Act, any such property is to be paid or delivered over to the representative of a deceased officer or soldier or other person entitled to receive the same—if such payment or delivery is to

be made in India, then the Military Secretary to the Government of the Presidency in which the deceased was quartered ; and if such payment is to be made elsewhere than in India, then the Secretary of State for War, or the Secretary of State for India in Council, as the case may be, may order that such property be transmitted to any other place where the same can be more conveniently paid or delivered over as aforesaid; and the obedience to any such order by any paymaster or other officer or person in whose hands such property is, shall be a sufficient discharge to him, and he shall not be liable in any manner by reason of such property having been in his hands and having been transmitted under any such order." The first thing that strikes one here is, that the payment which this section contemplates is a payment to the representative of the deceased officer or soldier, and there has been no payment on this case to the representative. The representative, we find in the Act, means any person taking out representation. It means the person armed with probate, letters of administration, or certificate of administration, so that that section cannot possibly protect the bank even if they came within the words "a person." But we very much doubt whether the bank does come within these words. A special meaning is given to them. It will be found in the 10th section. It means paymaster, officer, or person designated in the Royal Warrant ; and the person designated in the Royal Warrant in this case for receiving assets is the Military Secretary to Government. But, even if the words did cover the bank (it is unnecessary for us to determine that), the payment referred to is to a representative, and the bank, therefore, can claim no protection under it. Lastly, we come to Section 35, which says : " Every payment, or application of money and every sale or other disposition of property, made by the Secretary of State for War, or by the Secretary of State for India in Council, or by any Committee of Adjustment, or by any paymaster or other officer or person, in pursuance of this Act, or of any Royal Warrant for carrying this Act into effect, shall be good and valid as against all persons whomsoever ; and every such Secretary of State, and every officer

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belonging to any such committee, and every such paymaster, officer, or person as aforesaid, shall be, by virtue of this Act, absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of." It is a payment or application of money in pursuance of the Act which is spoken of. We are willing, as far as this suit is concerned, to give this section—without saying that is the true construction to give it—the most liberal construction it can bear, which would be that these words mean any payment, application, or act *bonâ fide* believed by the party paying it to be in pursuance of the Act, albeit really it might not be so. But there can be no *bona fides* where there is carelessness—where there is such carelessness as amounts to positive negligence. Here, if the bank had looked into the Act, they would have seen that neither the committee of adjustment nor the Military Secretary to Government had any right to make over these assets, exceeding, as they did, £100 in value, to the widow or next of kin, unless they were armed with probate or letters of administration, or a certificate of administration, for the direction is positive as to what is to be done with the assets. Whether the preferential charges were paid or were not paid, there is no authority in the Act for the payment over by either the committee of adjustment or the Military Secretary to Government, of the assets, or any portion of them, to the widow or next of kin in such a case as the present, unless they filled the character of creditors, preferential creditors, or representatives. This was not the case here; and, although the widow might have become the representative if she pleased, she did not do so, and was not in the position of the executrix in the case of *Pemberton v. Chapman* (c) which has been cited. The executrix there, even though she had not taken out probate, had authority under the will. Here the widow was quite differently situated, having no authority whatever. For these reasons we think that the decree of the learned Judge must be reversed; and as the plaintiffs have behaved

very moderately in claiming only two-thirds of the deposit, we think they are entitled to recover two-thirds of the sum paid over to the widow, with simple interest at 5 per cent from the date of such payment till payment by the Bank to the plaintiffs. We think, too, having regard to all the circumstances of the case, and especially to the fact that the bank displayed such very great readiness to arrest the second plaintiff, by issuing execution against him on the decree of the Division Court, and bringing him down all the way from Jamalpore to Bombay while an appeal was actually pending, the plaintiffs must have all their costs in both Courts. The decree will be for the plaintiffs for Rs. 3,444-15-8, with interest at 5 per cent per annum on Rs. 3,242-4-10 from the 11th February 1869 until judgment, with costs of the suit and appeal, and interest on the judgment at 6 per cent per annum until payment.

BAYLEY, J. :—I entirely concur in the judgment and in all the remarks of my lord.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 316 of 1872.

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April 29.

SHIVJI HA'SAM and others' ... (*Defendants*) *Appellants*.
DATU MA'VJI KHOJA' (*Plaintiff*) *Respondent*.

Bombay Minors' Act XX. of 1864, Section 1—Bengal Minors' Act XL. of 1858, Section 2—Age of majority—Charge of minors' property—Custom among Khojds—Joint Hindu family.

Under Act XX. of 1864, Section 1, it is the charge of a minor's property and not the property itself which shall vest in the Civil Court—a distinction which has been overlooked in *Bai Kesar v. Bai Gangd* (8 Bom H.C. Rep. A. C. J. 33).

The meaning of the 1st Section of Act XX. of 1864, when regarded in connection with the sequel thereof (which provides, for the information of the Civil Court, no such means, regarding the deaths of persons leaving infant children, as would enable the Court to act *ex mero motu* in every such case), is that the care of the persons of all minors (not being European British subjects) and the charge of their property shall be, as expressly

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provided in the Bengal Minors' Act XL. of 1858, "subject to the jurisdiction of the Court," and there is nothing in the subsequent sections of the Bombay Minors' Act which would lead to the conclusion that, until the Court is moved to exercise its jurisdiction, the care of the minors themselves or the charge of their property is vested in the Court, or that more was intended than that, like the Court of Chancery in England, the Principal Civil Courts of districts should have the right, if moved so to do, and if they so think proper, to take care of the persons of minors and charge of their property, and that, until the Court does so, the minors cannot be regarded as wards of the Court or their property as in its charge.

It is only for the purposes of Act XX. of 1864 that eighteen is laid down as the age of majority (Section 30). The Legislature has not, by that Act, intended to prescribe eighteen as the age of majority for all persons of all castes and creeds and for all purposes. That limit is not applicable to any person, until the Act be brought into play by the exercise of the Civil Court's jurisdiction.

It must be considered as the settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession among Khojá Muhammadans, and this rule was held to apply in a case of Khojás at Tháná, no evidence having been given in that case to show its inapplicability to the Khojás of that place.

One member (although an infant) of an undivided family, governed by the Mitákshará law, has not such an interest in the joint property as is capable of being taken charge of and managed by the Civil Court or a guardian appointed under Act XX. of 1864.

Quere—Whether, under Act XX. of 1864, the principal Civil Court of Original Jurisdiction in the district can take charge of the property of a person who has completed his sixteenth year, but is under eighteen.

THIS was a special appeal from the decision of G. Ayerst, Assistant Judge at Tháná, affirming the decree of the Subordinate Judge of the same place.

One Hásam, a Khojá inhabitant of Tháná, died, leaving him surviving his widow, named Manbái, and three sons, named, respectively, Shivji, Kásam, and Ali. The eldest of these sons, Shivji, after the death of his father, mortgaged to the plaintiff a house at Tháná, formerly the property of his father, for the sum of Rs. 1,999. The mortgage deed, which was dated 5th January 1867, was executed by Shivji for himself, and as guardian of Kásam, in the presence of Manbái. At the date of the mortgage Shivji was seven-

teen years and eight months old, Kásam fourteen, and A'li, who was not named as a party to the mortgage deed, was younger than Kásam. On 1st December 1869, Shivji, being then over eighteen years of age; Kásam, being then over sixteen but under eighteen; and A'li, being then under sixteen, respectively executed a document, to which Manbái was not a party, in ratification of the original mortgage. On 30th November 1870 the District Court granted to Manbái a certificate as guardian of A'li under Act XX. of 1864. In 1870 the plaintiff brought the present suit to recover the principal sum of Rs. 1,999, together with the interest due on his mortgage, and joined as defendants the three brothers and their mother, both as the guardian of A'li and in her individual capacity. The defendants all denied the validity of the mortgage sued upon; but the Subordinate Judge, holding it to be valid, made a decree in favour of the plaintiff, and on appeal the Assistant Judge affirmed that decree. He found that the mortgage had been executed for valuable consideration and for the benefit of the family, the money having been borrowed by Shivji partly for the purposes of the trade originally carried on by his father Hásam and continued by Shivji as head of the family for its benefit, and partly to pay off a debt due to one Hargovind for money expended in building the house enjoyed by the family at large. He also found that, after satisfaction of the mortgage, there would still remain sufficient family property for the maintenance of Manbái. He further found that the defendants had completely failed to prove the usage, as alleged by them, of the Khojás, that a male member of that community did not attain his majority until the completion of his twenty-first year, and held that a Khojá who had completed his sixteenth year was adult.

The special appeal, preferred by the defendants against this decree, was heard by WESTROPP, C.J., and WEST, J.

Nánabhái Harálal for the appellants.—The suit is based on the mortgage deed (Exhibit No. 3) executed by Shivji

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for himself and as guardian of his minor brother Kásam. But, as both these brothers are found to have been under eighteen years of age at the time of the execution of that deed, they were minors, and the deed is invalid. Every person who has not attained the age of eighteen years is a minor : *Madhusudan Manji v. Debigobinda Newgi (a)*. Although that ruling was under the Bengal Minors' Act XL. of 1858, the provisions of that Act are similar to those of the Bombay Minors' Act XX. of 1864, especially regarding the age of majority. Besides, on the death of Hásam, leaving three minor sons, Shivji, Kásam, and A'li, the property in dispute, by Section 1 of Act XX. of 1864, became vested in the Civil Court, and Section 18 prevented even their guardian, supposing they had one, from alienating the property. While by the Bengal Minors' Act, Section 2, the property of a minor is *subject* to the jurisdiction of the Civil Court—by the Bombay Minors' Act, Section 1, such property *vests* in the Civil Court. The distinction is pointed out in *Bái Kesar v. Bái Ganga (b)*. [WESTROPP, C.J. :—There is a manifest error in that distinction. Section 1 of the Bombay Minors' Act clearly says “that the charge of their (minors) property shall vest in the Civil Court,” not the property, and, therefore, the analogy drawn in that case between the terms in the Bombay Minors' Act and those in the Insolvent Debtors' Act as to the vesting of property, is wrong.] Before the passing of Act XX. of 1864 there was no law under which the Civil Court could take care of the property of minors in the Mofussil. It was then left to the respective laws of the parties to determine who was to be the guardian of a minor and to take care of his property. But that law was changed by Act XX. of 1864. The Civil Court is now made a sort of a guardian general of all minors. Even a father is not permitted to sue on behalf of his minor son : *Sitárambhat v. Sitáram Ganesh (c)*. Similarly, a suit against a minor was not permitted to be proceeded with, unless the minor was represented by one holding a certificate

(a) 1 Beng. L. R. F. B. 49 ; S. C. 10 Calc. W. R. 36 F. B.

(b) 8 Bom. H. C. Rep. A. C. J. 33. (c) 10 Bom. H. C. Rep. A. C. J. 250.

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of administration : *Dhondibá v. Kusá* (d). Section 2 qualifies Section 1. Where a person before death makes an arrangement for the management of his property during the minority of his children, by a will or otherwise, the Civil Court is to give effect to that arrangement. As regards the Assistant Judge's finding, that the parties to this suit, being Khojás, are subject to the Hindu law of inheritance applicable to a joint and undivided family, I contend that that law does not govern them. Even, supposing that that law regulates the succession and inheritance of the Khojás in Bombay, I contend that it does not govern the Khojás at Tháná, of which place the present parties are residents.

Macpherson (with him *M. C. Apté*) for the respondent.—The decisions in *Hari Mahádáji v. Vásudev Moreshvar* (e) and *Ghugūdhar v. Chimmáji* (f) are in direct conflict with the Full Bench ruling in 1 Beng. L. Rep. F. B. 49, and lay down that the Hindu law of minority is not altered by the laws of limitation, and that the term "minor" must be construed according to the general law. The reason assigned by Sir Barnes Peacock, C.J., in the Full Bench case for holding eighteen as the age of majority is not satisfactory. Under Act X. of 1865 (Indian Succession Act), twenty-one is the age of majority for the purposes of that Act. The same is fixed to be the age of majority by Act IX. of 1871 (Limitation Act) and Act V. of 1865 (Indian Marriage Act) repealed (except as to the Straits Settlements) by Act XV. of 1872. While this is so, Bengal Regulation XXVI. of 1793 fixes the age of majority at eighteen. So there is a great anomaly, greater than what Sir Barnes supposed in the Calcutta Full Bench case there would be. The language of Act XX. of 1864, Section 30, shows clearly that eighteen is the age of majority only for the purposes of that Act. The words are restrictive, and must be very strictly construed.

Under Act IX. of 1872, Section 11, every person is competent to contract on attaining the age of majority according to his own law. On the question whether the Hindu

(d) 6 Bom. H. C. Rep. A. C. J. 219 (e) 2 Bom. H. C. Rep. 325

(f) 5 Bom. H. C. Rep. A. C. J. 95.

1874. law of inheritance and succession is applicable to Khojá Muhammadans, I submit, on the authority of *Gángbái v. Thavar Mullá (g)*, *Karim Khatáv v. Pardhán Mánji (h)*, and *Hirbái v. Sāqábái (i)*, that it does apply to them.

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Nánabhái Haridás in reply.—In the two Bombay cases the question of majority under Act XX. of 1864 was not before the Court. The question was considered under Regulation V. of 1827. There is, therefore, no decision on the point whether Act XX. of 1864 does or does not affect the age of majority or minority. As regards the anomaly, the Indian Succession Act (X. of 1865) and the Marriage Act as well as the Contract Act are intended for the whole of India; while Act XX. of 1864, as the title clearly shows, is confined to the Bombay Presidency only. If the term “minor” in the Succession and other Acts had not been defined, it would have meant one thing in Bombay, another at Calcutta, and a third in Madras, and so on.

The following cases also were referred to in the course of argument:—*Jailunath Mitter v. Bolyechund Dutt (j)*, *Archer v. Watkins (k)*, *Cully Churn Mullick v. Bhuggobutty Churn Mullick (l)*, *Hearsey v. Girdharce Lal (m)*, *Baboo Lekraj Roy v. Baboo Mahtub Chand (n)*.

The judgment of the Court was delivered by—

WESTROPP, C.J. :—This was a suit to recover Rs. 1,999 as principal, together with such interest as was due upon a mortgage (dated 5th January 1867) of a house at Tháná, the property formerly of Hásam, a Khojá.

The mortgage (Exhibit No. 3) was executed by Shivji, the eldest son of Hásam, after the death of the latter, for himself (Shivji), and as guardian for his brother Kásam, described in the mortgage as then aged fourteen years. Shivji was seventeen years and eight months old at the date of the mortgage, A'li is younger than Kásam, and was not named as a party to Exhibit No. 3. Those three sons Hásam left surviving

(g) 1 Bom. H. C. Rep. 71. (h) 2 Bom. F. C. Rep. 276.

(i) Perry's Or. Ca. 110. (j) 7 Beng. L. R. 607.

(k) 8 *Idem* 372. (l) 10 *Idem* 231.

(m) 3 N. W. P. High Court Rep. 338. (n) 14 Moo. Ind. App. 393.

him, and a widow named Manbái, in whose presence the mortgage (No. 3) was executed by Shivji in the manner already mentioned. On the 1st of December 1869 Shivji, being then over eighteen years of age ; Kásam, over sixteen, but under eighteen ; and A'li being under sixteen, respectively executed a document (No. 27) in ratification of the original mortgage (No. 3). Mánbai did not execute it. Upon the 30th of November 1870 the District Court granted to Manbái a certificate as guardian of A'li under Act XX. of 1864.

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The mortgagee, Datu Má'vji Khojá, in 1870 brought the present suit to enforce the original mortgage. Shivji, Kásam, A'li, and their mother, Manbái, as guardian of A'li and in her individual capacity, were defendants to that suit, and respectively denied the validity of the mortgage sued upon.

The Subordinate Judge held it to be valid, and made a decree in favour of the plaintiff. On appeal the Assistant Judge, Mr. Ayerst, affirmed that decree. He found (*inter alia*) that the mortgage (No. 3) was executed for valuable consideration and for the benefit of the family, the money having been borrowed by Shivji, partly for the trade originally carried on by his father Hásam, and continued by Shivji as head of the family for its benefit, and partly to pay off a debt due to one Hargovind for money expended in building the house (value Rs. 4,000) enjoyed by the family at large. He also found that, after satisfaction of the mortgage, there would still remain sufficient family property for the maintenance of Manbái. The Assistant Judge further found that the defendants had completely failed to prove that by the usage of the Khojás (as alleged by the defendants) a male of their community did not attain his majority until completion of his twenty-first year. The Assistant Judge held that a Khojá who had completed his sixteenth year was adult.

Before my brother West and myself it was on special appeal argued that on the death of Hásam, under Act XX. of 1864,

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the charge of the property in dispute vested in the District Court (Section 1), and that his three sons being, at the date of the original mortgage, under eighteen years of age (Section 30), even their guardian, if they then had one under the Act, could not alienate, sell, mortgage, or otherwise incumber the house, or grant a lease thereof for any period exceeding five years, without the sanction of the District Court previously obtained (Section 18).

The 1st section of the Act provides, that " the care of the persons of all minors (not being European British subjects) and the charge of their property shall vest in the Civil Court", subsequently (Section 34) explained to mean the principal Civil Court of Original Jurisdiction in the district, *i.e.*, in the present case the District Court. It should be here observed that it is " the charge of the property," not " the property " itself, which is to " vest " in the Civil Court, a distinction which seems to have been overlooked in the judgment in *Bái Kesar v. Bái Gangá (o)*. A like provision to that in the Act for Bombay, exists in the similar Act for Bengal (Act XL. of 1858, Section 2), but with a slight variation. It enacts that " the care of the persons of all minors (not being European British subjects) and the charge of their property, shall be subject to the jurisdiction of the Civil Court." In *Sheo Nundun Singh v. Massamut Ghunsam Kooeree (p)*, Phear and Morris, JJ., have held, so recently as the 9th of January last, that one member (although an infant) of an undivided family, governed by the Mitákshará law, has not such an interest in the joint property as is capable of being taken charge of and managed by the Court or a guardian appointed by it under Act XL. of 1858. In that decision we concur. But it may be said that all of the sons of Hásam were under eighteen at the time of his death and of the execution of the original mortgage, and that, even assuming them to be members of an undivided family, subject to Hindu law, the charge of the property of all of them for that reason and by virtue of the peculiar language of the

(o) 8 Bom. H. C. Rep. 31 A. C. J.; see p. 33.

(p) 21 Calc. W. R. 143 Civ. R.

Act for Bombay (Act XX. of 1864) vested immediately upon Hásam's death in the District Court, and came under the protection of that Act. We do not, however, agree in that argument. We think that the meaning of the first section, when regarded in connection with the sequel of the Act, (which provides no such means for informing the Civil Court as to the deaths of persons leaving infant children as would enable the Court to act *ex mero motu* in every such case,) is that the care of the persons of all minors and the charge of their property shall be, as expressly provided in the Act for Bengal, "subject to the jurisdiction of the Court," and that, by the apparently accidental variation in language in the 1st section of the Act for Bombay, no such consequences were intended as insisted upon in the argument for the defendants. The subsequent sections show how it was intended that the Bombay Courts should be moved to exercise their jurisdiction, and we see nothing in those subsequent sections which would lead us to the conclusion that, until the Court is moved to exercise its jurisdiction, the care of the minors themselves or the charge of their property is vested in the Court, or that more was intended than that, like the Court of Chancery in England, the principal Civil Courts of districts should have the right, if moved so to do, and if they so think proper, to take care of the persons of minors and charge of their property; and that until the Court does so, the minors cannot be regarded as wards of the Court, or their property as in its charge. It is only "for the purposes of the Act" that eighteen is laid down as the age of majority (q). We should have expected a very differently worded enactment if, as contended for the defendants, the Legislature intended to prescribe eighteen as the age of majority for all persons of all castes and creeds and for all purposes. We do not consider that limit as applicable to any person until the Act be brought into play by the exercise of the jurisdiction of the Court. In the present case the Court did not exercise its jurisdiction (viz., by granting a certificate of guardianship of A'li to Manbái) until one, at least, of the

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But it is contended that Khojás are not regulated by the law applied to Hindus who are undivided in family and estate.

In the *cause célèbre* of *The Advocate General* at the relation of *Daya Mahomed and others v. H. H. Agá Khán and others*(*r*) Sir Joseph Arnould, in his able and eloquent judgment, pronounced on the 12th November 1866, after a long and laborious trial extending over some weeks, arrived at the conclusion that the Khojás are a sect of people whose ancestors were originally Hindus, and were converted to the Shiá branch of the Muhammadan faith and to the Imâmi Ismaili sub-division of that branch, and have, until the recent dissensions of the present century, throughout abided in that faith, and have always been and still are bound by ties of spiritual allegiance to the hereditary Imâms of the Ismailis. In matters matrimonial they appear to have followed the Muhammadan law. In the case just mentioned as well as *In the Goods of Mulbái* (*s*), although the circumstance is not mentioned in the report of the latter case, it appeared in evidence in the notes of Chief Justice Couch that, until recently when the division took place in the Khojá community, their marriages were celebrated by the Kazi of the Suni Muhammadans, but that, since the division, the marriages of the majority of the caste have been solemnized in the presence of His Highness Agá Khán, the minority still resorting to the Kázi. In the case of *Kasam Pirbhai* (*t*) the Muhammadan law of divorce was recognized. In that case the husband

(*r*) Reported *infra*. (*s*) 2 Bom. H. C. Rep. 276.

(*t*) 8 Bom. H. C. Rep. 95, Cr. Ca.

belonged to the minority, who had seceded to the Suni branch of Muhammadanism, and the wife was alleged to belong to the majority who still adhere to the Shiá tenets of the Imâm Ismaili School. Amongst the Khojás, widows re-marry as amongst other Muhammadans. But in matters relating to property, succession, and inheritance, the Khojas appear to have retained to a considerable extent the Hindu law. In *Hirbái v. Sonábái (u)* they succeeded in showing that the Koran did not govern the order of succession amongst them. The facts there, as stated by Perry, C.J., were as follow:—The plaintiff Hirbái and her infant sister were the only children of Hajibhái Mir A'li, a merchant in Bombay, who died intestate, leaving behind him a widow Sonábái, and property, moveable and immovable, in value about three lakhs of rupees. He had carried on trade in Bombay with his brother Sájan Mir A'li, and the latter, on his brother's death, took possession of the whole of the property and retained the same until his death in 1843, when he left a will appointing his sister-in-law Sonábái and his wife Rahimatbái, his executrixes. Hirbái filed her bill against these ladies, claiming, under the Koran, a share of her father's property according to Muhammadan law. The defendants pleaded that the family belonged to the community of Khojás, who were distinct from other Muhammadans, and under the government of laws and customs differing in many respects from those of Muhammadans, and which excluded daughters from any share of their father's property at his decease, except, if unmarried, from maintenance and the expenses of their marriage. On evidence being taken as to the custom amongst Khojás, it was held that the custom to exclude daughters from inheriting, under such circumstances as presented themselves in that case, was established, and Hirbái's bill was dismissed, Perry, C.J., saying: "I think that the attempt of these young women to disturb the course of succession, which has prevailed among their ancestors for many hundred years, has failed." We may add that neither Sájan Mir A'li nor Hajibhái Mir A'li left any male issue surviving them. This

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(u) Perry's Or. Ca., 110.

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fact is not stated in the report, but is known to one of the members of this Court. According to Hindu law, where brothers are undivided in estate, the survivor takes the whole. It seems reasonable to suppose that the two brothers, who were trading jointly, were in that position; and that this was so is supported by the recorded fact that, although Hajibhái, who died first, left a widow and daughters, Sajan kept possession of the whole of the estate until his own death, and, according to Hindu law as administered in this Presidency, Sajan, the survivor, not having any male issue, might dispose of his property by will, and did in fact appoint his wife Rahimatbái and his sister-in-law, Sonábái, widow of Hajibhái, to be his executrices, and their title as such was upheld against the daughters of Hajibhái. If Sajan had died intestate, his widow would, according to Hindu law, have been preferred to his female issue or to the female issue or widow of Hajibhái. The traditionary doctrine of the Supreme Court and of the High Court has, for upwards of, at least, twenty-five years, been that, in the absence of proof of special usage to the contrary, the law applicable to Khojás is, in matters relating to property, succession, and inheritance, the Hindu law as administered in this Presidency. Accordingly, in *Gángbái v. Thávar Mullá* (v), we find Sir Matthew Sausse, C.J., saying that the Khojá caste, although Muhammadan in religion, has been held to have adopted and to be governed by Hindu customs and laws of inheritance. In *the Goods of Mulbái*, already mentioned, it was held that when a Khojá widow dies intestate and without issue, property acquired by her from her deceased husband descends to his relations, and not to those of the widow. This was established in evidence before Couch, J., as the usage amongst Khojás, and is in accordance with Hindu law. The attempt by Mulbái's brother to establish the opposite usage completely failed. Couch, C.J., said:—"What may be the origin of this custom," (that in favour of the husband's relatives,) "I shall not now inquire. It is very possible that it arises

from some analogy to be found in the Hindu law. I agree with the observations of the counsel for the caveator, that the law by which the Khojás are governed, is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established that there is a Khojá custom which excludes the wife's relations from succeeding to property such as this."

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In a contest for administration in a case of intestacy, which has lately arisen between the mother and widow of a Khojá at the Ecclesiastical Side of the High Court, and, after occupying Sir Charles Sargent many days in hearing, now stands for judgment, the Ecclesiastical Registrar has collected several precedents *on* that side,—some being cases disposed of by the Court and others by the Ecclesiastical Registrar (*w*). In all, the Hindu law, as indicating the person entitled to succeed to the property, would seem to have been taken as the guide in granting letters of administration, except in one or two instances, in which the person so entitled expressly consented to the grant to another.

In the case of *the Goods of Vallu Musáni* administration was granted by the Court, in 1855, to an undivided brother of the deceased in preference to the widow. The children of the deceased were infants. The Hindu law clearly prevailed in that instance.

We think that we must consider it as the settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession amongst Khojá Muhammadans. There has not been any evidence that, in such a case as the present, there is in Bombay any usage amongst Khojás opposed to the Hindu law. And no evidence has been given to the effect that the ordinary rule in Bombay, viz., that of the Hindu law, is not applicable to Khojás at Tháná. We think, therefore, that we are bound to apply to them the Hindu law, and, it being found that the original mortgage was executed by

1874. Shivji as head of the family, and for its benefit, we must hold it to bind the family and to be valid against all of the sons of Hásam and the widow. The decree of the Assistant Judge is, therefore, affirmed with costs.

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[ECCLESIASTICAL SIDE.]

Appeal No. 255.

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July 2.

In the Goods of Rahimbháí Allubháí, deceased.

HIRBA'I, widow *Applicant.*
GORBA'I, widow, and another..... *Caveatixes.*

Khojás—Succession—Letters of Administration—Custom.

In the absence of satisfactory proof of a custom, differing from the Hindu law, the Courts of this Presidency apply to Khojás the Hindu law of inheritance and succession.

If a custom opposed to Hindu law be alleged to exist amongst Khojás, the burden of proof rests upon the person setting up that custom.

The Khojás, having been originally Hindus and converted from the Hindu religion by a Dai, or Missionary of the Imám of the Ismáílis, to the Mubammadan religion of the Shiá division and Imámi Ismáíli subdivision, and being partly regulated by Muhammadan law, partly by Hindu law, and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khojá community.

A Khojá having died intestate, and without leaving issue, was survived by his mother (a widow), his wife, and a married sister.

Held that, according to the custom of the Khojás, his mother was entitled to the management of his estate, and, therefore, to letters of administration, in preference to his wife or his sister.

THE hearing of this cause before Sir Charles Sargent, J., commenced on the 15th December 1873, and occupied six sitting days in that month, fifteen sitting days in January, and three sitting days in February 1874; that is to say, twenty-four days in the aggregate.

<i>Ferguson and Macpherson</i> for the applicant Hirbái ; the Advocate General (<i>Scoble</i>) and <i>Pigot</i> for the caveatrix Gorbái ; <i>Latham</i> and <i>Inverarity</i> for the caveatrix Rahimbháí ; <i>Mayhew</i> and <i>B. Tyabji</i> for Fazulbhái Kásambháí and Gulám Husen Jáffarbhái, caveators.	1875. HIRBÁ'I v. GORBÁ'I AND ANOTHER
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The facts and arguments appear with sufficient fulness in the judgment, which was given on the 22nd of June 1874 by

SARGENT, J. :—The question to be determined in this case is, who is entitled to administer the estate of one Rahimbháí Allubháí, a Khojá, Mahomedan merchant, who died on 20th December 1870 childless, leaving a widow, mother, and a married sister.

The first application for letters of administration was made on the 30th of June 1871 by Hirbái, claiming as widow of the deceased ; on the 17th of July 1871, Gorbái, the mother of the deceased, applied for letters of administration ; and on the 1st of August 1871, Gorbái and Rahimatbái, mother and sister of the deceased, respectively filed caveats against the application made by Hirbái.

On the 7th of August 1871 Gorbái filed an affidavit, setting forth more particularly the grounds of her claim, as mother of the deceased, to the administration of the estate.

In the 11th paragraph of that affidavit she says :—" I am informed and verily believe that by the customs and usages prevailing and recognized by the orthodox or Shiá Imámi Ismáili Khojás, to which sect or community the said Rahimbháí Allubháí belonged in his life-time, and to which I and my family have belonged and are now belonging, I, as the mother of the said Rahimbháí Allubháí, and in the absence of a male member in our said undivided family, am entitled to be recognized as the head member of the family, and, as such, am entitled to the whole estate, whether moveable or immoveable, of such undivided family, and that the said Hirbái and Rahimatbái, if residing under my care and pro-

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 HIRBA'I That, according to the said customs and usages, a widow, on
 v. her remarriage, is bound to relinquish to the head member
 GORBA'I of her husband's family, whether male or female, all she has
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 family to which she belonged. That a widow, unwilling
 to live with the surviving members of such undivided family,
 and who takes up her residence in a separate dwelling-house,
 is entitled to a certain sum fixed by the Khojá Shiá Jamát
 for her maintenance, if the parties themselves do not come
 to some arrangement on amicable terms in that behalf :"
 and that any member of the said community, whether male
 or female, who does not follow the customs of the caste,
 and disobeys the orders of the *Jamát* in that behalf, is
 punishable with excommunication or exclusion from the
 community. On the 8th of August 1871 Rahimatbái
 filed an affidavit, alleging that Hirbái was only entitled
 to a befitting maintenance, and asking that administration
 might be granted to Gorbái as the head surviving member
 of the family.

On the 1st of June 1872 Rahimatbái filed a second affidavit stating the custom to be as follows :—" That if a male member of the said sect (known as the Shiá sect of the Khojás) dies intestate and without issue and leaving a widow, a mother, and a sister, the widow is entitled to maintenance out of the estate of such deceased person, and the mother succeeds to the entire estate, subject to such maintenance of the widow, and that the widow on her remarriage is not entitled to any maintenance, but, on the contrary, is liable to restore to the estate all the ornaments and jewels belonging to her husband in her possession. That, in the event of the mother dying intestate, the daughter succeeds absolutely to the entire estate, subject also to the maintenance of the widow if not married."

On the 6th April 1872 Hirbái filed an affidavit in answer, by the 7th paragraph of which she says :—" The Shiá sect of the Khojá community, being the sect to which the said Gorbái, Rahimatbái, and myself do belong, is, to the best of

my knowledge, information, and belief, governed almost exclusively by Hindu law in the matters of inheritance, and I believe that the statement made in the said affidavit of the said Gorbái, and in the said affidavit of Visrámbháí Gángjí and others, about the law and custom applicable to the case of inheritance to the estate of a member of our community dying intestate without issue and leaving a widow, a mother, and a sister, is incorrect and untrue. The fact is, that the mother in such case, except that she is, on account of her relationship to the deceased and of her age, respected by the members of the family, and is sometimes allowed a share in the management of the estate, owing to the youth or ignorance of the other members of the family, is not considered the head of the family; and is not entitled as of right to the management of the estate of her deceased son; neither is she, as alleged head of the family, entitled to any property or right beyond what she is entitled to as mother, and as mother she is only entitled to suitable maintenance. The widow in such a case is entitled absolutely to all the personal and all the self-acquired immoveable estate of the deceased, and to a life estate in his ancestral immoveable property, and is not bound to live with the mother or sister of the deceased, and loses none of her aforesaid right by not living with them or either of them. The sister of the deceased would in such a case be entitled to no more than a suitable maintenance until her marriage, and to have her marriage expenses, according to the position of the family, paid out of the estate."

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On the 7th August 1871 Fazulbhái Kásambháí filed a caveat, claiming, by his affidavit in support, to be a distant male relation of the deceased, and to be entitled with other distant male relations to the property of the deceased, and asking that the estate might be administered by the Administrator General.

On the 14th August 1872 Jáffarbhái Gulám Husen filed a caveat, also claiming, in his affidavit, to be a distant male relation, and together with other distant male relations, therein particularly referred to, to be entitled by the cus-

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toms of the community to the estate of the deceased, and asking that the estate may be administered by the Administrator General.

It is at once apparent, from the statement of the grounds on which the several claimants seek to obtain letters of administration, that they one and all rely on some rule of succession differing from what is laid down in the Koran, which, *prima facie*, constitutes the substantive law for all Muhammadans now. As far back as 1847 it was decided by Sir E. Perry in the case of the *Khojás and Memons*, reported in the Oriental Cases, (a) that if a custom as to succession is found to prevail amongst a sect of Muhammadans and is valid in other respects, the Court will give effect to it though not agreeing with the express text of the Koran. That ruling has always been regarded as having settled the question as to the admissibility of proof of a special custom of descent, and was acted upon by Sir Richard Couch in *the Goods of Mulbái*, (b) and I have no hesitation in following it on the present occasion.

The question, therefore, to be determined, as it presents itself at the outset, is, whether either of the claimants has satisfactorily shown that there is such a custom of inheritance among Khojás as that which is relied on for establishing his or her claim to the administration of the estate of the deceased.

Before, however, proceeding to discuss the evidence in the case, it will be necessary to consider an argument which was addressed to the Court on behalf of the petitioner Hirbái. It was urged that it must be taken as settled by authority that the Hindu law of inheritance is the customary law of Khojás in the absence of proof of any other custom to the contrary, and that, consequently, all that is necessary for Hirbái to prove is, that she is the widow of the deceased, and that the *onus* lies upon the opposing claimants to prove the existence of the respective customs on which each of them relies.

(a) Perry O. C. 110 ; see p. 125. (b) 2 Bom. H. C. Rep. 276.

It was apparently thought that the judgment of Sir E. Perry in the *Khojā and Memon* case, to which I have referred, was tantamount to a decision to that effect. On an examination, however, of that case it is clear, I think, that all that was there decided, was what I have already stated, with the addition that the particular custom pleaded, viz., that females are not entitled to any share of their father's property but only to maintenance, and the expenses of their marriage, if unmarried, was satisfactorily proved. At the same time Sir E. Perry expressed an opinion, as the probable conclusion from the evidence before him, that the Khojās were originally Hindus. He says : (c) "The Khojās are a small caste in Western India, who appear to have originally come from Sindh or Cutch, and who, by their own traditions, which are probably correct, were converted from Hinduism about four hundred years ago by a Pīr named Sadr Dīn. Their language is Cutchi; their religion Mahomedan; their dress, appearance, and manners, for the most part, Hindu. These latter facts, however, do not warrant the conclusion being drawn, if such conclusion is necessary for decision of the case (and I think it is not) that the Khojās were originally Hindu, for such is the influence of Hindu manners and opinions on all castes and colours who come into connection with them that gradually all assume an unmistakable Hindu tint. Parsis, Moguls, Afghans, Israelites, and Christians, who have been long settled in India, are seen to have exchanged much of their ancient patrimony of ideas for Hindu tones of thought; and, in observing this phenomenon, I have been often led to compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material."

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It may be clearly gathered, I think, from the tone of the judgment, and the discussion which the question received, that it was regarded as *res integra*.

(c) At p. 112.

1875. But it was said that in any case, since the judgment of
 HIRBA'I Sir E. Perry, an uniform practice has prevailed in this
 v. Court in the exercise of its ecclesiastical jurisdiction, both
 GORBA'I in its contentious and non-contentious business, of adminis-
 AND ANOTHER tering the Hindu law of inheritance in the absence of proof
 of any special custom to the contrary.

Now an examination of the records of the Ecclesiastical Side of the Supreme Court (during the interval of 16 years which elapsed between the date of Sir E. Perry's decision and 1863) shows that there were as many as ten applications for letters of administration to Khojá estates, seven of which were disposed of by the Registrar as non-contentious business and three by the Court itself.

The first of these latter cases is that of Vallu Musáni in 1855, (*d*) who died leaving a widow, a son and daughter who were minors, and a brother. The widow applied for administration. A caveat was entered by the brother, alleging that his brother had been his partner and joint in food and estate, and that the widow was illiterate and unfit to manage the estate, and that the widow of a Khojá leaving male issue was only entitled to maintenance. The Court granted letters of administration to the brother. This decision is in accordance with Hindu law on whichever ground the Court proceeded.

In the next case, that of Pirbhái Manji (*e*), the deceased left a widow and an infant son. Application was made by the widow, and at first opposed by persons who relied on a will; but, the will having been declared invalid, they alleged that the deceased had other relations, viz., a maternal grandmother and a maternal uncle, and his four sons. Administration was granted by the Court to the widow. This decision is in accordance with Hindu law, and exclusively so, as by Muhammadan law the widow would not be the natural guardian of her infant son for the purpose of managing his property, although she might be entitled to the

(*d*) Decided by Yardley, C.J., 26th November 1855.

(*e*) Decided by Yardley, C.J., 11th February 1856.

custody of the child if under seven. And, as no custom was alleged, it is apparently a decision that the Court will apply Hindu law.

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In the last case of Dossá Nánji in 1862 (*f*) the deceased left a widow and niece. The widow applied for administration, and the niece objected on the ground that the widow intended to sell the property; and the Court, consisting of Sir M. Sausse and Sir J. Arnould, granted administration to the widow, she undertaking not to sell or mortgage. This is also in accordance with Hindu law.

Passing to the cases decided by the Registrar, the first is that of Jairáz Dharramsi in 1855, who died leaving a widow, four brothers, and no issue. A brother applied for administration, and the widow entered a caveat, but withdrew it, and letters were granted to the brother. The second is that of Mahomed Alluwany, where the application was by a brother, alleging that he had been joint in food and estate with his brother, and that a widow was only entitled to maintenance; and the Registrar, on consent of the widow, granted letters to the brother. In the third case, Pardhán Rávji, the mother applied, there being a widow and an infant son, and the Registrar refused, unless the widow consented, which she ultimately did. The fourth is that of Mithu Somji, where the family left consisted of three sisters, and administration was granted to one, the others being in Cutch. The fifth is that of Vallubháí Alvany, where letters were granted to the widow, there being a mother and daughter. In the sixth, that of Dádá Alvánná in 1859, the family consisted of a son, six daughters, and a grandson, and administration was given to the son. In the seventh, that of Pachan Punjáni, administration was granted to the widow.

It is to be remarked that in all these cases, with the exception of two, the widow either applied for administration or entered a caveat, and that in all administration was either given to the widow, or, if not, it was with her consent, or

(*f*) Decided by Sausse, C.J., and Arnould, J., 29th September 1862.

1875. under special circumstances, analogous to those of an undivided Hindu family, as in the case of Vallu Musáni.

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It may be said that it would be unsafe to draw any positive conclusion from these scanty materials as to what the practice of the Court really was, although they undoubtedly point to such a practice as I have stated, and are difficult to explain on any other supposition.

We are, however, not without corroborative evidence on this point, and that, too, having regard to the source from which it comes, of a most valuable description. In 1863 Sir M. Sausse, delivering judgment in *Gāngbái v. Thávar Mulla (g)*, speaks of the Khojá caste as "one which, although Muhammadan in religion, had been held to have adopted and to be governed by Hindu customs and laws of inheritance." In that case the question for the Court was the construction to be put on the word "charity" in the will of a Khojá. It was contended that it must be construed with reference to Hindu notions of "charity", which are expressed by the Hindu word "dhurm", and that, consequently, the devise was bad, having regard to the decisions of the Court as to devises to charity under the description of *dhurm* in Hindu wills. The Court refused to adopt this argument, and held that the testatrix, having made her will in English, must be taken to have intended what was clearly expressed in it, and that the Court could not speculate on the particular views she might have had as to charity.

Although, therefore, there was no actual necessity for deciding the question whether Khojás were governed by Hindu customs and laws of inheritance, it was assumed throughout that they were so, or there would have been no foundation for the plaintiff's contention, and no necessity for the Court's reasoning to justify its conclusion in favour of the devise in question. The statement of the learned Judge was, therefore, something more than a mere *obiter dictum* as argued here by counsel for the mother, and the case shows that the Khojá caste was treated by all parties

as one which must *primâ facie* be taken to be governed by Hindu customs and notions. As it is not likely that so careful a Judge as Sir M. Sausse would have mistaken the real point decided by Sir E. Perry in the *Khojâ and Memon case*, his statement as to the law of inheritance by which Khojâs were governed must have reference to the established practice of the Court in dealing with questions of succession in any one of its several branches of jurisdiction.

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Since 1863 the applications for administration of Khojâ estates have been very few. In 1864, in the *Gopds of Pachan Punjâni*, administration was granted to the widow. There appears to have been no opposition to it. In 1866 the question of the administration of the estate of Mulbâi came before Sir R. Couch (*h*), the question being between the brother of the deceased and the relations of her husband from whom she had inherited the property. The case made for the brother of the deceased was that his claim was in accordance both with Hindu and Muhammadan law; whilst the caveator contended that the Khojâ law of succession was neither Hindu nor Muhammadan law, but a special law of their own, which was to a great extent analogous with Hindu law. Sir R. Couch in his judgment says: (i) "I agree with the observations of the counsel for the caveator, that the law by which the Khojâs are governed is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs," and he held the custom proved in that case. The custom would appear to be in accordance with Hindu law according to the authorities, although it does not appear to have been regarded as such either by the learned Judge or counsel for either party.

Although some remarks of the Chief Justice would almost imply that Hindu law would be applied in the absence of proof of any modification in it having been adopted by the community, they can be scarcely relied on as an express authority to that effect. The case was doubtless rather treated as one between persons claiming under two rival customs.

(*h*) 2 Bom. H. C. Rep. 276.(i) *Id. ib.* 284.

1875. There was one other case in 1870, in the *Goods of Lilbái*, wife of Rahimbháí Dharramsi. She left three sons and a daughter, all minors, and a husband, surviving her, and letters of administration were granted to the husband by the Registrar on 9th March 1870.

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The most important occasion, however, on which the manners, customs, and religion of the Khojás were brought prominently under the notice of the Court was in the case known as the *Agá Khán case*, decided by Sir J. Arnould in 1866. (j) That learned Judge, at p. 11 of his interesting and exhaustive judgment, in answer to the question "who and what are the Khojás?" says: "From the evidence adduced in the case, the more probable conclusion, I think, is that they were originally Hindus of the trading class inhabiting the villages and towns of Upper Scinde." That the doubt expressed by the words "I think" was not intended to apply to their having been originally Hindus, but only to the locality from which they came, is conclusively shown by his making the circumstance of their having been converted from Hinduism the basis of his very important argument, which he raises at p. 18, on the religious book of the Khojás called *Dasutar*, the first nine chapters of which treat of the nine incarnations of the Hindu god Vishnu. Unless the Khojás were originally Hindus, the inference drawn from that work by the learned Judge in favour of the Pir Sadr Din, by whom they were converted, having been a Shiá and not a Suni, would have had nothing to rest on.

The customs of the Khojás once more engaged the attention of the Court in the case of *Kásam Pirbhái and his wife Hirbái (k)*, but there was no necessity in that case for considering the present question, and the judgment delivered by the Chief Justice is silent on it.

This summary of the decisions of this Court, as well as of the cases disposed of by the Registrar in the non-contentious business, explained by the remarks of Sir M. Sausse in *Gangbái v. Thávar Mulla (l)*, satisfactorily shows, I think,

(j) See post, 113 (k) 8 Bom. H. C. Rep. 95 Cr. Ca.
(l) 1 Bom. H. C. Rep. 71.

that the Khojás have, for the last 25 years at least, been regarded by the Court, in all questions of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that an uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved.

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It may be said that no express decision can be cited in support of either of the two propositions, that the Khojás were originally Hindus who were converted to Muhammadanism, retaining their Hindu laws and customs, or that this Court will always apply the Hindu law of inheritance in their case in the absence of special custom ; but the uniform course of practice, extending over the last 25 years, has assumed the truth of the first proposition, and has never, I believe, deviated from the rule enunciated by the latter.

Lastly, I may add that in a special appeal recently decided by Sir M. R. Westropp, C.J., and West, J., a question of inheritance having arisen as to the estate of a Khojá, the Court held that, in the absence of proof of a special custom, Hindu law must be administered (*m*). I need scarcely say that the opinion of the Chief Justice from his long experience in the ecclesiastical business of this as well as of the late Supreme Court, is especially valuable on a question of this nature.

Under these circumstances this Court cannot but throw upon those who dispute the right of the widow to administer (a right which would be clearly hers under Hindu law) the burden of proving the existence of a custom inconsistent with that right.

I shall first deal with the claim set up by Fazulbhái Kásambhái and Gulám Husen Jáffarbhái, distant relations of the deceased.

Their contention is that the female members of the family, including widow, mother, and sister, are ~~only~~ entitled to maintenance out of the estate, and that, in default of male

(*m*) *Supra*, p. 281.

1875. issue, the nearest male relation, however distant, or, at least,
 HIRBA'I within the degree of relationship in which they stood to the
 v. deceased, takes the property, subject to the charge of main-
 GORBA'I taining the surviving unmarried female members.
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In support of this contention they rely generally on the evidence given by the witnesses called by the other claimants as elicited in cross-examination, but more particularly on that given in examination-in-chief by Rahimbháí Hemráj, Ahmedbhái Habibháí, and Hussan Khán Mahomed. Secondly, on the evidence of their own witnesses—Alli Mahomed Bhimji, Mahomed Dharramsi, and Gulám Husen Hirji—the first and third of whom mentioned cases, supporting their view of the custom, which had happened at Jafferábád and Ragoola in the state of Bhaunagar.

Lastly, they urge that the custom as alleged by them is the more reasonable one, having regard to the admitted rule of the caste, that a widow on her remarriage is bound to restore to her deceased husband's family all property which she may have received from him.

Now, of the witnesses called by Mr. Ferguson for the widow, Rahimbháí Hemráj and Ahmedbhái Habibháí, two of the most respectable Suni members of the Khojá community, undoubtedly give direct evidence in support of the custom as stated by Mr. Tyabji's clients, the distant male relatives. The first states, as his view of the Khojá custom of inheritance, that, where there are no children, the male relations take the property and maintain the mother, widow, and sister; that the male relations may be at any degree of distance; and that they always take in preference to women, who are only entitled to maintenance. The latter says: "I consider our settled custom is for male relations to take the property, and for females only to have maintenance out of the estate. That is my opinion." Afterwards to the Court he said: "I say so, because I have always heard it." Evidence to the same effect was also given by the witnesses called by Mr. Tyabji—Mahomed Dharramsi, a Suni merchant of respectable position; Alli Mahomed Bhimji, who was certainly

a witness of great intelligence ; and Gulám Husen Hirji, a native of Jafferábád and well advanced in years. None of these witnesses, however, were able to mention any instances in which a relation more distant than a brother or father of the deceased had taken the property, except the two last witnesses, who mentioned three or four cases which had occurred at Jafferábád and Ragoola. In the case of Válji Manji a first cousin took ; in Gigá and Tejá Ragváni, a nephew ; and in Deoráj Virji's case apparently more distant relations took.

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It was, however, urged that Mr. Tyabji's clients could not reasonably be expected to give many instances in which very distant relations had taken ; such cases would necessarily be very few and far between. But that, if the custom were satisfactorily established in the case of brothers, fathers, uncles, nephews, and cousins, that would be sufficient to establish the principle, and it might well be inferred, at least in default of evidence to the contrary, that the custom was, as they broadly state it, in favour of male relations, however distant. This argument is, perhaps, not altogether unreasonable.

Passing, however, to the numerous and important witnesses called by the widow and mother of the deceased, we find a mass of evidence which satisfactorily shows that, whatever difference of opinion there may be as to which of those relations has the preferable right, there is little or none as to the right of one or other of them, where there is no male issue, to take the property and manage it, unless where there is a father living, or the deceased and some near relation, as uncle, brother, or nephew, had been living and carrying on business together, or perhaps simply carrying on business together.

As to what their powers over the property might be, nearly all spoke hesitatingly ; whether they or either of them could sell or make a good title, whether they or either of them could spend all the income, or were bound to accumulate the surplus income after providing for their maintenance,

1875. were matters on which it may be conceded they differed not
 HIRBA'I a little ; but, notwithstanding the many discrepancies and
 v. apparent contradictions into which they were led in cross-
 GORBA'I examination by the ingenuity of counsel, or the difficulty of
 AND ANOTHER examination by the ingenuity of counsel, or the difficulty of
 speaking with accuracy on such a subject, it is impossible to
 entertain any doubt, after reading their evidence, that they
 considered the widow and mother (subject to the above ex-
 ceptions) were entitled, at least, to manage the property
 during their lives or until they married.

It will, I think, be sufficient to refer particularly to the
 evidence of the *Mukhi* and *Kamaria* of the caste and one
 or two of the most intelligent and elderly members of the
 community. The evidence of the other witnesses called by
 Gorbái was substantially to the same effect.

To begin with Allárakhiá Sumár, the *Mukhi* of the Shiá
 Khojás in Bombay :—This witness was called to support the
 mother's claim as against the widow, and in his examination-
 in-chief maintained, in the event of a man dying without
 male issue, the right of the mother to the property absolutely
 as against all relations but the father. However, [when
 cross-examined by Mr. Ferguson, he says : “The widow is
 only entitled to maintenance. She manages the property if
 it is separate.” Further on he says : “The brother's son
 cannot take when the widow is alive. How can the uncle
 take when the widow is alive? The son, brother, father,
 grandfather can take, but no other male relation whilst the
 widow is alive.”

The evidence of Kháki Paddamsi, the *Kamaria*, is to the same
 effect. Whilst the mother is living the right of the widow is to
 maintenance, but he distinctly admits her right to the manage-
 ment of the property as against the male relations in default
 of male issue. He says : “When the mother dies, the brother
 takes the property, not the widow—I mean if it is joint pro-
 perty ; but, if it is separate, the widow takes it.” And, again :
 “The surplus income, when the widow takes the property,
 after providing herself with maintenance, remains with her
 during her life-time”; and, again : “The brother has no

interest in the property during the life-time of the widow, if he was separate from his brother."

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Lálji Laddhá, after stating that the mother manages the property if the brothers were divided, says: "If the deceased leaves only distant relations they take as far as the third generation. In that case the widow takes, and it goes afterwards to the uncle and the uncle's son. Where the relations are distant the widow can spend more than is necessary for her maintenance."

The other witnesses for Gorbái were not questioned particularly as to the widow's rights as against male relations other than male issue, and, they necessarily confine themselves to stating the mother's rights; but their evidence is distinctly opposed to the alleged general principle set up by the distant relations, viz., that all female relations are only entitled to maintenance out of the estate, and not to the ownership or management of it.

If we pass to the witnesses for Hirbái, excepting Rahimbháí Hemráj and Ahmedbhái Habibháí, their evidence is clear that the widows of Khojás dying without male issue are entitled to take and manage the property as against other male relations (except, perhaps, under circumstances where brothers or an uncle and a nephew have been living and trading together), and the only point on which they speak with indistinctness is as to her powers, and that the mother is similarly entitled in default of a widow, or on her death or remarriage.

I shall refer only to the evidence of two of those witnesses' Jairáz Pírbháí and Sujibháí Mánikbhái. The former whom I consider a most trustworthy witness, says: "The mother has the better right to manage the property, giving the widow and sister maintenance. If a brother were left, he would manage, but not distant relations; but it would go to them after the mother." Afterwards he says: "There is no established custom where the property goes after the mother." In cross-examination by Mr. Tyabji he says: "If sister or widow survive the mother, I do not think distant

1875. relations can take. I say this as far as I know. Only very
 Hirbái near relations take when the parties are separate. I say that
 v. only a brother or father would take in that case.”
 Gorbái
 AND ANOTHER

Sujibhái Mánikbhái, who is a cousin of Hirbái, considers that both widow and mother take before all male relations except a brother, who would manage where he and deceased had been living jointly. This witness was cross-examined by Mr. Mayhew respecting the course he took with regard to the administration of the estate of Kásam Kaman, who died at Zanzibar, and was his father's paternal uncle's son. He left no widow or legitimate children, but a mother, and the witness claimed to be his nearest male relative. It was pointed out that the power of attorney which he sent in his own name, and the letters which he wrote to Zanzibar respecting his relative's estate, were inconsistent with his evidence. In the letter (Exhibit No. 1) he doubtless refers to the mother's right as a right merely to maintenance and clothing. At the same time in a subsequent letter he urges, as an argument for the property being sent to Bombay, that the mother is sitting there, and that no one can claim whilst she is alive. All that can be said is, that the letters show that he asserted his right to have the property sent on both grounds. Considering that he was acting with the full knowledge of the mother, and was obviously on good terms with her, this is only what he might be expected to do.

Lastly, if we examine the actual cases referred to by the witnesses, in which a brother or other near male relation has taken, where there has been a mother or widow surviving, it will be found that in all of them, where the circumstances are known, the deceased and such near male relation were living jointly on the income of ancestral property, or were engaged in trade, or, lastly, it was deemed the more convenient course, or it was the result of a compromise. In the cases of Jivá Mánik, Vallu Musáni, Rámji Varji, Vallu Alváni, Piru Sumár, and Kásam Karmalli, the deceased and the male relative who succeeded, had been living together on ancestral property or engaged in trade. Those of

Jairáz Dharamsi, Gulam Husen Dhanji, and Kásam Fakir . 1875.
 may be explained on one or other of the latter grounds as matters of arrangement between the parties. In the former case Rahimbháí Dharamsi says that, in the case of his brother Jairáz, the widow said : " I am a woman : where can I go ? " and of her own accord gave him and the other surviving brothers power. " We administered it for her until she remarried." In the latter case the witnesses say that a lump sum was given, which certainly points to the compromise of an essential right by the widow to the property, or, at least, to the management of it, rather than to a payment in lieu of a simple claim to maintenance.

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Looking at the vastly preponderating evidence in favour of the right of the widow and mother to the management, at least, of the property, as against any but very near relations, and those, too, under exceptional circumstances, and that there are no cases on record of any relation more distant than a father or brother taking, except three, which are stated to have occurred at Bhaunagar and Jafferabad, it would be impossible, I think, to hold that the custom, as contended for by Fazulbhái Kásambháí and Jáffarbhái Gulám Husen, has been proved.

I now pass to the consideration of the question as between the widow and the mother. The two principal witnesses in support of the mother's claim are the *Mukhi* and *Kamaria* of the *Jamat*. The former states that by the custom of the caste the mother succeeds to the property of her son who dies leaving no male issue, and can dispose of it as she thinks fit, providing maintenance for the widow and unmarried female members of the family. As to the rights of the widow, he commences by placing them as low as even Mr. Tyabji's clients could wish. In examination-in-chief he says : " She is only entitled to maintenance out of the estate ; she cannot spend the income. She never manages the property where there are male relations within four generations." In cross-examination, however, he says : " If a man dies leaving a widow and nephew who is grown up, the nephew takes it, and the widow is only entitled to maintenance." Asked the

1875. question again, he says : " I do not know for certain." Asked again, " The custom is come down from ancient times. Hirba't The widow is only entitled to maintenance. She manages the property if it is separate, and preserves it for the nephew." " Gorba't Afterwards the witness says : " The widow and nephew would manage it together," and then that he could not speak positively. Afterwards he says : " How can the brother's son take when the widow is alive ? How can the uncle take when the widow is alive ?" In examination-in-chief he had stated that some widows acquiesce, and some object when instigated by others,— " I cannot say which are the most numerous. When they object, they compromise it, and sometimes come to the *Jamát*." In answer to me he said : " When I say that the mother should succeed in preference to the widow, I mean that I consider it the right rule. Not many widows object to their mothers-in-law taking the property ; when not on good terms with their mothers-in-law, they do object. They only object when they are instigated by others. I consider that there is no division of opinion in the caste."

The evidence of Kháki Paddamsi, *Kamaria* of the caste, was to the same effect, but had the advantage of being expressed with far greater clearness and precision. He says : " If a man dies childless, leaving mother, sister, widow, and no near male relations, the mother takes. The father takes if he is alive, but no other male relation before her. He becomes absolute owner, but is bound to pay the widow maintenance. The sister takes if there is no mother and widow. If a man leaves a widow and unmarried sister, the widow manages the property and maintains the sister. On her death the sister becomes the owner. The widow has no ownership in the property ; I mean she cannot dispose of it or sell it. Subject to the claims of the widow and sister, the mother is absolutely entitled to the property, and can apply it to any purpose she likes. This is an ancient custom ; I have heard it from old people. I never heard any one say the widow was entitled before the mother." Further on he says : " I say it is usual for the widow to acquiesce in the

mother's taking. The widows who object are few. I heard this custom from members of my own and other families in Bombay." In cross-examination by Mr. Tyabji he says: "The mother may sell a house, but must put the proceeds out at interest. How can she do what she likes with it when the widow is entitled to maintenance? She takes the income, but must keep the property. After her death the brother would take. Where there is no widow, but only a brother, she can do what she likes with it. If she remarried, she could not take it to her new husband's house; she must give it to the brother. When the mother dies, the brother takes the property, not the widow—I mean if it be joint property, but if it is separate, the widow takes it. The surplus of the income, when the widow takes the property, remains with her during her life-time. The brother has no interest in the property during the life-time of the widow if he was separate."

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HIRBA'I

"

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The cases relied on by these witnesses in support of the superior claim of the mother were those of Virji Rattansi, Nura Thava, Virji Fakir, Kásam Surji, and Muchi Vallab. These were all settled in favour of the mother's right to the management of the property, either privately or by the *Jamát*, after the question had been referred to it by the mother and widow. Whether the mother resisted on principle, or merely as to *quantum* of maintenance, is not so clear.

The next most important witness was Hussanbhái Gulám Husen, a ship-owner in a large way of business, having branches at Zanzibar and Mozambique. This witness spoke to what have been called "the Zanzibar cases." Those cases, assuming them to be genuine, undoubtedly go to prove that the custom, as understood by the *Jamát* of Zanzibar, supports the right of the mother.

Karmalli Suji, who had lived forty years at Zanzibar, and been twice *Mukhi* of the *Jamát*, gives the same account of the custom at that place.

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The other witnesses who were called for Gorbái were nearly all persons engaged in petty trade, or were more or less closely connected with Gorbái, or on terms of intimacy with her relations. Their evidence is substantially the same as that given by the *Mukhi* and *Kamaria*, but I do not consider that it can be regarded as adding much independent strength to that which has been already referred to.

The most important evidence, however, in support of the mother's superior claim, was given by one of the witnesses called by Hirbái herself—I allude to Jairáz Pirbhái. I have already said that I consider him a most respectable and reliable witness. He is a man of position in his caste, and was, I believe, honestly anxious to assist the Court with such knowledge of the customs of the caste as he possessed. He says: "Inheritance and succession with us are determined partly by Hindu law and partly by custom. I say this partly from what has been decided in the Courts, and partly from what obtains now in Khojá communities. If a man dies leaving no children, a widow, mother, and sister, I think the mother has the better right to manage the property, giving the widow and sister maintenance. I know of no instance. I remember one instance of a widow managing. Vullu Alváni's widow did. I do not know Pirbhái Manji, nor Dossá Manji. I knew Pachan Punjá. In that case the widow managed. I remember the widow of Hirji Manji. She managed the estate. I do not remember any instance of the mother managing the estate. There is a strong feeling in the Khojá caste on this case. I believe a few leading members of the *Jamát* are making exertions for Gorbái. They have considerable influence with our community." Again, "there is no established custom as to where the property would go after the mother. The *Jamát* has made no custom. I do not think the question is in doubt so far as the mother is concerned. I have heard of instances of small properties, but cannot remember them. It is not a fixed custom, but many people are of this opinion. I mean the *Jamát* has never assembled and determined it so. I do not consider it to be a fixed custom until the *Jamát* has done

so." However, afterwards he says: "I do not remember a single instance of inheritance being determined by the *Jamát*." To the Court he said: "What I have stated as to the rights of mothers and widows, are my own views of the custom. In the case of the mother I consider it is well established. I believe the majority of the community are in favour of my view as to the mother. As to the rest of what I have said, there is not, I think, any well-established custom."

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Passing to the other witnesses called by Hirbái, the first is Kulpan Rattansi, who although a Shiá, from his own admission was clearly not an adherent of Agá Khán. He considered there was no settled custom. He says: "The influential party takes the property. Such matters are generally settled privately. There is no settled custom."

Hussan Khán Mahomed, a Suni Khojá, who had always lived in Bombay, said: "The widow, mother, and sister are all entitled to maintenance, but I cannot say who will succeed. The Sirkár must decide. The widow's right is preferable to the mother's"—obviously expressing his own opinion.

Mir Ali Dámá says: "I never heard of the mother taking in preference to the widow. They are entitled in equal shares. The mother and widow would take my property jointly if I and my brother were separate; that is my view of it, what I think would be best. I cannot say whether the mother or widow should take the chief part in the management. There is no settled custom."

Pirbhái Khimji says: "I believe when a man leaves a widow, mother, and sister, the widow is entitled, but there is no settled custom. If the property is small, the question is usually compromised." In cross-examination he says: "The mother is entitled to be maintained in good order. After the widow dies, the mother takes. The mother is much respected. If she is intelligent, she is regarded as the head of the house. The daughters-in-law should listen to their mothers-in-law if their husbands are alive, and also

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 Hirbái their mothers-in-law and some do not."

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Salli Mahomed Gulám Seyá says: "When a man dies, leaving a mother; widow, and sister, I believe the widow takes. The Hindu law of inheritance is principally the guide in matters of succession. I never heard of an instance in which the mother was preferred to the widow. Before the present case I do not remember hearing the point raised."

Dharamsi Kaku, Rahimbháí Dharamsi,* and Sujibháí Mánikbhái, all respectable and intelligent witnesses, gave similar evidence in favour of the widow's claim. The latter two, however, are open to the remark that they are connections of the widow Hirbái.

Such being the evidence on the rival claims of the mother and widow, it is at once clear, I think, that it is not of a character to support the pretensions of either party if tested by the strict rule, applied in cases where a custom is set up at variance with the written law—such, for instance, as would properly be required where a particular class in the Hindu community sets up a special law of inheritance differing from the general Hindu law. Under the special circumstances, however, of this Khojá community, the question as to the adequacy of the evidence presents itself under a somewhat different aspect. This Court having established a practice based upon the assumed peculiar circumstances under which this community became converted to Muhammadanism, the question is no longer between the written positive law laid down in the Koran, and the customary law of inheritance, as alleged by a sect of Muhammadans, but, rather between such customary law and that law which this Court has adopted as the one which presumably is the custom of the community until the contrary be proved. Such evidence, therefore, under the circumstances of this case, may, I think, be deemed sufficient to rebut that presumption, although it may fall short of "proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the governing rule of the community," to

adopt the language of Scotland, C.J., in the case of *Sivanan-anja v. Muttu Ramalinga* (n), and that it will be sufficient if, in the language of the Jurist Thibaut, "a majority, at least, of the community look upon the rule as binding, and it be established by a series of well-known, concordant, and, on the whole, continuous instances" (o).

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Now there is undoubtedly a considerable amount of evidence in this case to show that the great majority of the community consider that, according to the custom of their caste, the mother ought to have the management of the property in preference to a childless widow, and that that custom has (so far as there is any evidence before the Court) been invariably adopted by the *Jamāts* of Bombay and Zanzibar, and also in all cases of private arbitration. The cases to which I have referred in discussing the evidence of the *Mukhi* and *Kāmaria* establish this satisfactorily as to Bombay. With respect to Zanzibar, the evidence is, of course, not so satisfactory, because of the difficulty of testing the accuracy of the statements; but the witness who gave the information was a man of respectable position as a merchant, and he was confirmed by the *Mukhi* generally in his statement of the custom, and in particular as to one of the instances cited by him. On the whole, looking at the close connection between the *Khojās* of Bombay and those at Zanzibar, I do not think I should be justified in disregarding that evidence.

As to the quality of the evidence generally, it is no doubt true that many of the witnesses are such as not to be entitled to much weight in a question like this, which, as admitted by the witness *Jarāz Pīrbhāi*, has the ruling principal members of the community enlisted on one side. At the same time, there are many witnesses of a most respectable position, who, it may fairly be presumed, would not lend themselves to stating the custom differently from what they believed it to be, and amongst them I would refer more especially to *Jarāz Pīrbhāi*. Again, if we turn to the

(n) 3 Mad. H. C. R. 75; see p. 77. (o) 1 Thib, Sys. de P. R. 15.

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evidence in support of the widow's claim, it consists exclusively of her own relations, and the support which that evidence receives from the case of Vallu Alvani in 1866, in which letters of administration were granted to the widow by the Registrar after the mother had been cited. No evidence, it is true, was given by the other side to explain why the mother consented to this being done, and the widow is certainly entitled to the benefit of it. It may, however, perhaps be explained on the supposition that the mother and widow were living together in amity, and that it was a matter of indifference to whom the administration was granted. In any case, it ought not to be allowed to outweigh the rest of the evidence, which, I think, satisfactorily establishes that the leading members as well as the great majority of the community look upon the custom as alleged by the mother, to the extent, at least, of giving her the right to the management of the property in preference to the widow, as well established; and that the *Jamāts*, which are the governing bodies of the community in all matters relating to the caste, regard the custom, as alleged, as the custom of the caste, and act upon it in all cases referred to them by the parties interested.

Lastly, if we bear in mind the circumstance that Khojá widows can remarry, and that, as a matter of fact, it is very common for them to do so, and that on their doing so, as admitted by all the witnesses, they cease to have any right or interest to or in the properties of their deceased husbands, it is far from unlikely that the mother, who, as the evidence shows, is treated with unusual respect in the Khojá community, and would generally be past the age at which women marry in eastern countries, would gradually come to be regarded as the safer person to be entrusted with the management of the property.

Under these circumstances I think I ought to declare the custom set up by Gorbai to be proved, so far and to that extent only as it confers the superior right on the mother (being a widow) to the possession and management of the

property in preference to the widow. The letters of administration must, therefore, issue to the applicant Gorbái. Hirbái and Gorbái must both have their costs out of the estate, considering the importance and unsettled character of the question in dispute between them. Rahimáthbhai and the other caveators must pay their own costs.

An order was accordingly made on 23rd June 1874, refusing the application of Hirbái, allowing the caveat of Gorbái, and dismissing the caveats of the other caveators, and allowing the application of Gorbái for letters of administration. Against this order Hirbái appealed, and the appeal was heard on the 18th, 19th, 25th of June, and 2nd of July 1875, by WESTROPP, C.J., and GREEN, J.

Purcell and Lang for the appellant.

Scoble (Advocate General), *Iatham*, and *Pigot* for the respondent Gorbai.

There was not any appearance for the other respondents, Fazalbhái Kásambhái and Jáfarbhai Gulám Husen.

WESTROPP, C.J., in delivering judgment, said:—Though this case occupied the Court below for twenty-four sitting days and this Court for four days we think we may deliver our decision at once, as the learned Judge in the Court below has afforded to us such valuable assistance by his elaborate discussion of the authorities and evidence on the point before us, viz., whether the widowed mother of an intestate Khojá, dying without male issue, is entitled by the custom of that community to letters of administration to the estate of her deceased son, in preference to his widow, on which question Sir Charles Sargent seems to have availed himself of every available source of information. No doubt, among Muhammadans proper or Hindus the evidence adduced in this case would not be sufficient to establish an ancient and invariable custom different from their ordinary law. In considering a question of custom in a case among Muhammadans proper or Hindus we have always followed the doctrine laid down by the Privy Council, that the party

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seeking to establish a custom different from the ordinary law of his community, must prove that the custom is ancient and invariable, and considered to be legally binding.

But in this case we are dealing, not with Muhammadans proper or Hindus, but with a caste converted from the Hindu religion about four hundred years ago by Pír Sadrín, a Dai or missionary of the Imám of the Ismá'ílis, and their religion has, since the date of their conversion, been Muhammadan of the Shiá division and Imámi Ismá'ili form. In comparatively recent times a schism has occurred amongst them in Bombay. A numerical minority, professed to belong to the Suni division of Muhammadans, insisted that the religion of the Khojás at large was Suni, that the public property of that community ought to be applied to Suni purposes, and sought to cast off all allegiance to H. H. Agá Khán as Imám of the Shiá Imámi Ismá'ilis. However in a suit brought by some of the innovating party with these objects (*Dayá Muhammad and others v. H. H. Agá Khán and others*) (p), the hearing of which occupied twenty-four days in A.D. 1866, Sir Joseph Arnould held "that the Khojás never were Sunis, but that from the beginning they have been, and (with the exception of the relators and plaintiffs, and their followers in Bombay) still are Shiás of the Imámi Ismá'ili persuasion."

In matters matrimonial it is not denied that the Khojás are regulated by Muhammadan law. On that footing was the decision in *Pirbhái's* case (q), which, so far as we know, has never been questioned. Amongst ordinary Muhammadans marriages are performed by the Kázi or his naibs or deputies (1 Bom. H. C. Rep. 236, and Appendix XVIII., XXI., XXVIII.). The marriages of all Khojás in Bombay used to be performed by him until the schism. That fact appeared in *Dayá Muhammad v. H. H. Agá Khán* above mentioned, and in *the goods of Mulbaí* (r), in the notes of Couch, C. J., which I have examined, but not in the published report. Since the schism, however, those Khojás, who regard Agá

p) See post p. 323.

(q) 8 Bom H. C Rep. 95 Cr. Ca.

(r) 2 Bom. H. C. Rep. 276.

Khán as their head, have had their marriages performed by him, while the others continue to employ the *Kázi* as before. It has here been generally assumed that, in the absence of proof of custom to the contrary, the law of succession and inheritance amongst the Khojás is the law of their origin, viz., Hindu. This has generally been assumed to be the rule, and was so expressly laid down, in a *dictum* by Sausse, C.J., in the case of *Gángbái v. Thávar Mulla* (s). Perry, C. J., in *Hirbái v. Sonabhai* (t) made a decision in conformity with Hindu law, but did not decide that Hindu law is to be generally followed; and it is to be noticed that the case before him arose in the same family as that the members of which were parties to the suit in which occurred the *dictum* of Sausse, C.J., to which we have just referred. In *Mulbái's* case (u) Couch, C.J., did not decide on the principles of Hindu law but on the evidence in the case. The applicant there sought to come in on a footing of custom, and the custom proved was contrary to the one set up. As a matter of fact, the custom proved was in accordance with Hindu law. Recently, *Shivji Hásam v. Datu Marji* (v), a special appeal from Thánáh heard by my brother West and myself, was decided by us in accordance with Hindu law, because there was neither allegation nor proof that there was any custom governing the matters there in issue, contrary to Hindu law.

In this state of the authorities we think that our brother Sargent was right in placing the burden of proof on the mother and the distant male relations of the deceased intestate, as they were setting up customs not in conformity with Hindu law, whereas the widow's claim was completely consonant with Hindu law.

It is, however, evident, from what has been said, that the Khojás are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law, or Hindus by the Hindu law, and hence it is that it would not be reasonable to require such

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(s) 1 Bom. H. C. Rep. 71.

(t) Perry O. C. 110.

(u) 2 Bom. H. C. Rep. 276.

(v) *Supra*, p. 281.

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stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law, as from a Hindu.

Now it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Pársis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment, giving effect to those views. Unanimity, of course, could not be expected, but the rules which were found generally to prevail might be made law; and though the religious difference existing among members of the Khojá caste might create some difficulty, it would not, we think, be insuperable.

As to the evidence in this case, we think with the learned Judge in the Court below that it greatly preponderates in favour of the mother's claim, though, no doubt, there is a considerable conflict; and we also think that he rightly placed great reliance on the evidence of Jairáz Pírbháí. Though the evidence at large is not such as in the case of Muhammadans proper or Hindus would suffice to establish an ancient and invariable custom, we think we must hold that it is sufficient to establish a custom in a community, such as this, placed midway between Muhammadans and Hindus. We think that, under such circumstances, the Court ought to act upon satisfactory proof that the custom has existed for a considerable time, and has been generally accepted by the great majority of the Khojá community. All costs must come out of the estate.

GREEN, J. :—I concur, and would only add that the fact that all the cases decided on this point by the *Jamát*, or public authority in the community, were decided in favour of the mother, seems not only to support the view which we have taken of this case, but also, inasmuch as the estates in all those cases were small, to disprove the assertion that the decisions of the *Jamát* were procured by money or influence.

Order affirmed.

Note.—The following is a report of the *Agá Khán* case in which judgment was delivered by Arnould, J., on 12th November 1866, referred to in both the foregoing judgments of the lower and appellate Courts.—*Ed.*

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MUHAMMAD SAYA', PÍR MUHAMMAD KA'SAMBHA'I, and } *Plaintiffs.*
FA'ZALBHA'I GULA'M HUSEN }

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MUHAMMAD HUSEN HUSENI (otherwise called AGA' KHA'N) } *Defendants.*
and others }

Jurisdiction—*Rule for the regulation of the rights of dissident parties in a community distinguished by some religious profession*—*Sunís—Shiás—Shiá Imámi Ismáílís—Agá Khán—Khojás—Injunction.*

In a suit by certain members of the Khojá community in Bombay for an account of all property belonging to, or held in trust for the community come to the hands of the treasurer and accountant of the community; for a declaration that the treasurer and accountant had ceased to be such officers of the community; for an order directing the treasurer and accountant to deliver all the property of the community in their hands; for a declaration that the property of the community was held and ought to be applied to and for the original charitable, religious, and public uses or trusts, to or for which they were dedicated and to none other, for the sole benefit of the Khojá sect and none other; and that no person not being or having ceased to be a member of the same, and in particular no person professing Shiá opinions in matters of religion, was entitled to any share or interest therein; for a scheme to carry such declaration into effect; and for an injunction restraining one of the defendants from interfering in the management of the property and affairs of the Khojá community or in the election and appointment of officers, from excommunicating any members of the community, from celebrating marriages, and from demanding or receiving any offering:

Held that the Court had jurisdiction to entertain the suit.*

When the Court, in exercise of its charitable jurisdiction, is called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the litigants will be regulated by reference to the religious tenets held by the community in its origin, and a minority holding those tenets will prevail against a majority which has receded from them.

History of the sects of Sufís, Shiás, and Shiá Imámi Ismáílís.

History of Agá Khán.

History of the Khojás and their relations with the hereditary Imám of the Ismáílís.

Relations of Agá Khán with the Jamát of the Khojás of Bombay.

* See *The Advocate General v. Ferozsháh Attard*, 1 Bom. H. C. Rep. Appx. p. ix.

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The tenets of Muhammdanizm to which the first Khojás were converted were those of the Shiá Imámi Ismáili sect.

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In order to enjoy the full privileges of membership in the Khojá community, a person must be one of that sect whose ancestors were originally Hindus, which was converted to, and has throughout abided in the faith of, the Shiá Imámi Ismáilis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imáme of the Ismáilis.

There is no public property impressed with a trust, either express or implied, for the benefit of the whole Khojá community.

Agá Khán, as the spiritual head of the Khojás, is entitled to exercise a potential voice in determining who, on religious grounds, shall or shall not remain members of the Khojá community.

THIS was a suit on the Equity side of the late Supreme Court, instituted by an information and bill, filed by the relators and plaintiffs, representing a minority of the Khojá community in Bombay, against the defendants, representing a majority of that community. The prayer of the bill sought that an account might be taken of all property belonging to, or held in trust for the Khojá community of Bombay which had come to the hands of two of the defendants, *Mukhi* and *Kamaria* (treasurer and accountant) of the said community; that those two defendants might be declared to have ceased to be such *Mukhi* and *Kamaria* since 8th November 1861, and might be ordered to deliver all the property of the community in their possession to such persons as the Court might direct. The 5th clause of the prayer, which was the most important, and raised the question on the decision of which the result of the suit virtually depended, was in the following terms:—"That it may be declared that the said trust premises are holden and ought to be applied to and for the original charitable, religious, and public uses and trusts to or for which the same were dedicated and intended so to be, and to none other; and to and for the sole benefit of the Khojá sect and none other; and that no person not being a member, or having ceased to be a member of the same, and in particular no person professing Shiá opinions in matters of religion and religious discipline, is entitled unto, or ought to have, any share or interest therein, or any voice in the management thereof." The bill then went on to pray that, if necessary, a scheme might be settled for carrying into effect the above declaration, and also for the periodical and regular election, from time to time, of the *Mukhis* and *Kamarias* of the community, and generally for the security and management of the property of the community, and concluded with a prayer for an injunction restraining the first defendant, Agá Khán, from interfering in the management of the trust property and affairs of the Khojá community, or in the election and appointment of *Mukhi* and *Kamaria*, from excommunicating any Khojás from the said community, or depriving them of the various privileges appertaining to membership, from celebrating marriages in the *Jamát Khánda*, from demanding or receiving from any Khojá any oblation, cess, offerings, &c., in the alleged spiritual or temporal capacity of the first defendant.

The case was heard by Arnould, J., for twenty-four days during the months of April and June 1866, when the following counsel appeared for the several parties :—

Ferguson for the Advocate General.

Anstey, Scoble, and Macpherson for the relators and plaintiffs.

Bayley (Advocate General) and *Howard* for the first defendant, Agá Khán.

McCulloch and *Green* for Allárakhiá Sumár (the *Kanaria*) and seven other defendants.

Louis and *Hayllar* for Asso Gángji.

Taylor for Dhartamsi Punjábhai.

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On behalf of the relators and plaintiffs it was contended that the Khojás were originally converted to the Suni tenets of Muhammadanism, which had ever since been the religion of the community, and that no one not professing Suni tenets could be held to be a Khojá. The defendants, though representing a numerical majority of the so-called Khojá sect, yet, having renounced the Suni tenets and adopted those of the Shiás, could not be held to be Khojás, and were, therefore, not entitled to the possession of the property of the community or to interfere in any way in the management of the affairs of the community. The Khojás have always observed and still observe the Suni forms of ritual, and employ Suni priests. Agá Khán, being the hereditary Imám of the Ismáilis, is necessarily a Shiá, and, therefore, neither he nor those who acknowledge him as their spiritual head can claim to be considered Khojás. The Shiás are, in fact, not Muhammadans at all. The Khojás of Bombay have never recognized Agá Khán as their spiritual head, but, on the contrary, since 1829 have been constantly at variance with him. Even if the Suni sect of the Khojás had changed their religion, they ought not on that ground to be deprived of their interest in the caste property, according to Act XXI. of 1850.

On behalf of the defendants it was contended that this question, being a caste dispute, was not within the jurisdiction of the Court. It was further urged that in matters of caste governance the opinion of the majority must prevail. At any rate, the caste property must be shown to have been impressed with a trust before the party now in possession can be turned out. If the religion to which the Khojás were originally converted, was that of the Shiás, the plaintiffs, being Sunis, must fail. If there is no evidence what the original religion was, the opinion of the majority must prevail, in which case the plaintiffs, being a minority, fail. The main argument, however, was addressed to the historical question as to the tenets to which the Khojás were originally converted. The converter was himself a Shiá Imám Ismáili, and the whole Khojá community, with the exception of a few families in Bombay, still profess the tenets of that sect, and have always regarded, as their head, Agá Khán and his ancestors, the hereditary Imáms of the Ismáilis. The use of the Suni ritual was a politic concession to avoid persecution, quite in accordance with the doctrine of mental reservation, which is allowed by the Shiás but not by the Sunis, and in other religious practices the Khojás conform not to the Suni but to the Shiá tenets. The Dasavatar

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or religious book of the Khojás, is evidently Shiá in its origin, seeing that it assumes as true a great part of the Hindu mythology, which would be allowed to a Shiá but not to a Suni missionary. The so-called property of the Khojás consists, in fact, of subscriptions made by Khojás for the benefit of Agá Khán as the acknowledged spiritual head of the community.

In the course of the argument the following works were extensively referred to by counsel on both sides:—Hamilton's *Hedaya*, the *Koran*, Morley's *Administration of Justice in India*, Muir's *Life of Mahomed*, Sale's *Preliminary Discourse to the Koran*, De Sacy's *Exposé de la Religion des Druzes*, D'Herbelot's *Bibliothèque Orientale*, Von Hammer's *History of the Assassins*, Gibbon's *Decline and Fall of the Roman Empire*, Milman's *Notes*, Kátab al Wackidi, Burckhardt's *Arabic Proverbs*, Dabistan, *Voyages de Chardin*, Burton's *Pilgrimage to Mecca*, Sir J. Malcolm's *Translations from the Persian* in Vol. I of the *Transactions of the Literary Society of Bombay*, Desatir, Dasavatar, Watson's *History of Persia*, Moshún's *Account of the Initiation of Ismáilis*, the *Lokrea*, the *Ginans*, *Nasi Khut Tawarikh*, Ockley's *History of the Saracens*, *Kitab al Sigaset*, Kinneir's *Topographical History of Persia*, *History of Sir C. Napier's Administration of Sind*, Elphinstone's *History of India under the Mahomedans*, Akbar Shah's *Divine Monotheism*, *Autobiography of the Emperor Baber*. The following legal authorities were also referred to:—*Rajah Deedar Hosein v. Raneo Zuhoor-oon-nissa* (a), *The Khojá and Memon Succession Cases* (b), *Shore v. Attorney General ex relatione Wilson* (c).

ARNOULD, J., in delivering judgment, after reviewing the scope of the prayer of the bill as stated above, continued as follows:—

The 5th clause of the prayer is the most important. It, in effect, raises that question, with which the evidence in this suit has been principally concerned, as to what, in their origin, were the religious tenets of the Khojá community, and what from the beginning has been the nature of their relations, spiritual or temporal, with the ancestors of the first defendant, Agá Khán, who on his part alleges that he is, and that his ancestors in a long line of hereditary descent have successively been the Imáms or spiritual chiefs of the Shiá Imámi Ismáíliis.

On the one hand the relators and plaintiffs contend that Pír Sadrdin (whom both sides admit to have originally converted the Khojás from Hinduism to some form of Muhammadanism) was a Suni; that the Khojá community has ever since its first conversion been and now is Suni; and that no persons calling themselves Khojás who are not Sunis, are entitled to be considered members of the Khojá community, or to have any share or interest in the public property of the Khojá community or any voice in the management thereof.

On the other side it is maintained by the first defendant, and by the other defendants, who are in the same interest with him, that Pír Sadrdin was not a Suni, but a Shiá of the Imámi Ismáíli persuasion; that he was a Dai, or missionary, of one of the direct lineal ancestors of the first defendant—the Imám or spiritual chief for the time then being of the Imámi Ismáíliis; that from

(a) 2 Moore I. A. 441. (b) Perry O. C. 110. (c) 9 Cl. and Fin. 353.

the time of the first conversion till now the Khojá community has been and still is, (with the exception of the relators and plaintiffs and those comparatively few families among the Bombay Khojás who adhere to them,) of the Shiá Imámi Ismá'ili persuasion; that the said community (except as aforesaid) always has been bound in close ties of spiritual allegiance to the ancestors of the first defendant, Agá Khán, the hereditary Chiefs or Imáms of the Ismá'ilis whom the Khojá community always have regarded and (except as above) still regard as their *Mírsheds* or spiritual heads.

It is to the issue thus raised that the great mass of the voluminous evidence taken in this suit was directed. It was expressly admitted by Mr. Anstey, the very learned and able leading counsel for the relators and plaintiffs, that the determination of this issue would, in effect, dispose of the whole of the present suit.

"If the Khojás", he said, "are proved in their origin to have been Sunis, the relators and plaintiffs must succeed: if they are proved to have been originally Shiás or Shiá Imámi Ismá'ilis, or in any way non-Sunis, then the defendants must succeed." An attempt, indeed, was subsequently made (after Mr. Anstey's return to England had left the conduct of the case in other hands,) to recede from the position thus taken; but, after full consideration and for reasons which I shall have to state elsewhere, I am of opinion that Mr. Anstey's view was the correct one, and that the decision of the Court upon the issue thus raised, must substantially determine the rights of the contending parties on this record.

The conclusion thus arrived at, bears upon a point which it is necessary to dispose of at the outset, the effect, namely, either as a decree or as a precedent, of a certain "Declaration of Rights" (set out at length in the 3rd paragraph of the present information and bill) pronounced by Sir Erskine Perry in the sittings of the late Supreme Court, after the third term of the year, 1851.

This "Declaration of Rights" was pronounced by Sir Erskine Perry in a suit, commenced by information and bill on 21st February 1850, between parties, some of whom (as notably the first defendant) were the same parties, and all of whom respectively represented the same interests as those now represented by the relators and plaintiffs on the one side, and the first and other principal defendants on the other side, in the present suit. The information and bill, indeed, in the present suit purports to be, and may be taken as being, in continuation of the information and bill in the former suit.

As a decree it is quite clear that this expression of judicial opinion is not binding: it was never drawn up as a decree, and, moreover, contains clear internal evidence that it was never intended so to be. Sir Erskine Perry, in the course of his observations, calls it, as it has consequently been termed above, a "Declaration of Rights", and expresses a hope that the Khojás, by its aid, will "be able to elect a *Mukhi* and *Kamaria* and manage their caste affairs among themselves, without rendering any further application to the Court necessary."

As a precedent I should, from the great learning and ability of Sir Erskine Perry, and his known familiarity with the history and usages of the Native

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populations of India, be inclined to pay this expression of judicial opinion the highest respect on all points in regard to which I could treat it as an adjudication upon precisely the same questions as those now before me, and pronounced upon the same or a very similar state of proved facts.

For instance, upon the question, whether this Court—that is, the late Supreme Court on its Equity side—has jurisdiction to entertain this case at all, regarded as a matter of caste dispute arising in a Native community—upon *this* question which, as appears from his Declaration of Rights, was expressly raised before Sir Erskine Perry in argument, and decided by him in the affirmative, I shall follow his judgment as a binding precedent.

Upon other points affecting the relative rights of the Khojá community of Bombay and of Agá Khán, the principal defendant in that suit as in the present suit, I should not feel bound by Sir Erskine Perry's decision, unless I were certified, which, from the nature of the case I have not been and cannot be (no authorized report of the evidence and proceedings in this former suit being in existence), that his decision was arrived at upon the same or substantially the same evidence as that which has so exhaustively been adduced before me during the protracted hearing of the present suit, which occupied the Court for no less than twenty-four days.

As to the great question in the present suit, that upon the determination of which, as already intimated, the decision of the controversy between the^o litigants, in my judgment, really turns—the question, namely, whether the Khojás are, and from the first have been Sunis or non-Sunis, subordinate to the Imám of the Ismáílis as their spiritual head or not so subordinate—this does not appear to have been a question upon which Sir Erskine Perry was called upon to pronounce, it is one, certainly, upon which he has not pronounced any adjudication whatever.

Sir Erskine Perry declared, upon the evidence before him, that certain property and certain privileges belonged to the Khojá community, but he did not decide, nor is there anything to show he ever was called upon to decide, *what are the conditions of full membership in the Khojá community*—whether the circumstance of being a non-Suni (as the relators and plaintiffs contend), or of being a Suni and as such disowning spiritual allegiance to the hereditary Imám of the Ismáílis (as the first defendant and those who join with him contend), is to exclude from caste membership in the Khojá community, and to disentitle a man from sharing or having an interest in the public property of the community, or a voice in the management thereof.

The principal question, then, in the present suit, viz., *aye or no*, were the Khojás, in their origin as a separate religious community, Sunis or non-Sunis—Suni or Shiá Imámi Ismáíli—bound or not bound by ties of spiritual allegiance to the Imáms of the Imámi Ismáílis—this question is quite untouched by any previous judicial decision.

It is an historical question, to be decided by evidence as to matter of fact, and is quite as much within the competency of the Equity side of the late Supreme Court, in the exercise of what is technically called its *charitable* jurisdiction, as any other question of fact arising out of the caste disputes of the Khojá community.

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The cases in which similar questions have been entertained by English Courts of Equity are well known, and were copiously referred to at the bar. They are that class of cases of which the case of Lady Hewley's charities, reported as *Shore v. Wilson (d)*, is probably the most familiar, and which all proceed upon and illustrate the now well-established principle that, when Courts of Equity, in the exercise of their so-termed *charitable* jurisdiction, are called upon to adjudicate between the conflicting claims of dissident parties in communities held together or distinguished by some religious profession or denomination, the rights of the litigants will be regulated by reference to what upon inquiry turn out to have been the religious tenets and opinions held by the community in its origin or at its foundation.

A minority, however numerically small, holding fast by these opinions, will be entitled to prevail against a majority, however numerically large, which can be shown to have receded from or renounced them,

The Khojá community is a community of this kind. The fact of a man being a Khojá indicates that he holds by some form or other of religious belief. What that form of religious belief was at the origin of the Khojás as a separate and distinct community, is, therefore, a question of fact which, if disputed, must be determined by evidence in a Court of Equity, when asked, in the exercise of what is called its charitable jurisdiction, to decide on the relative rights of the dissident bodies within the same sect.

The relators and plaintiffs have, in several passages of their information and bill, spoken of the Khojás as a *sect*: they notably do so in the 5th clause of their prayer, in which they asked for a declaration that the public property of the community ought to be applied to the original "*religious*" trusts for which they were originally dedicated, and for the sole benefit of the Khojá "*sect*," and that no person not being a member of such sect, especially that no person professing Shiá opinions in matters of *religion* and *religious discipline*, is entitled to any share or interest therein.

Before entering upon the direct investigation as to whether the Khojás, in their origin as a distinct and separate community, were Sunis or non-Sunis, it will be necessary, in order to a due appreciation of the evidence, first to consider the following questions:—

First—*What are the SUNIS as distinct from the SHIA'S?*

Secondly—*Who and what are the SHIA' IMA'MI ISMA'ILIS?*

Thirdly—*Who and what is the first defendant, AGA' KHA'N?*

Fourthly—*Who and what (independently of their distinctive religious belief) are the KHOJA'S, and what are and have been their relations with the first defendant and his ancestors?*

Fifthly—*What have been the relations of the first defendant, AGA' KHA'N, with the particular community to which the relators and plaintiffs belong, viz., the Khojá community of Bombay?*

First, then, as to the Sunis and the Shiás, and their respective peculiarities of religious opinion and practice.

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The Sunis are the orthodox Mussulmans, the people of the *Sonna* or Tradition. Their *kulm*, or profession of faith, is the simple one—"There is no God but God and Mahomet is the Apostle of God." To this the Shiás add, "and Ali, the companion of Mahomet, is the Vicar of God."

The elevation of Ali to an almost co-equal position with the Apostle of God himself, may be stated popularly as the great distinctive tenet of the Shiás.

Etymologically the word "Shiás" means either "Separatists" (which is probably the more correct derivation), or persons who are pure (Shiás) from the blood of those members of the family of Ali who early fell victims to the hostility of the Suni Ommeiades, the Caliphs of Damascus.

It will conduce to clearness if I here recall in rapid outline the history of the earliest divisions in Islám.

The Apostle of God died without appointing a "caliph" or successor.

The caliph or successor of the Apostle of God (who had been both a temporal and spiritual sovereign) was to succeed him in both these capacities; he was to be both "*Emir-al-Momnin*" or "commander of the true believers" and also "*Imám-al-Moslemín*" or "spiritual chief of the devout"—as we should say in our Latin or Western phrase, "Supreme Pontiff as well as Emperor or temporal ruler."

The general expectation of Islám had been that Ali, the first disciple, the beloved companion of the Apostle of God, the husband of his only surviving child Fatimá, would be the first caliph. It was not so to be. The influence of Ayesha, the young and favourite wife of Mahomet, a rancorous enemy of Fatimá and of Ali, procured the election of her own father Abubokr; to Abubokr succeeded Omar, and to him Osman; upon whose death, in the year 655 of our era, Ali was at last raised to the caliphate. He was not even then unopposed; aided by Ayesha, Moawiyah, of the family of the Ommeiades, contested the caliphate with him, and while the strife was still doubtful, in the year A.D. 660, Ali was slain by a Kharegite, or Mussulman fanatic, in the mosque of *Cufa*, at that time the principal Mahometan city on the right or west bank of the Euphrates,—itself long since a ruin, at no great distance from the ruins of Babylon.

This assassination of Ali caused a profound sensation in the Mahometan world. He was, and deserved to be, deeply beloved, being clearly and beyond comparison the most heroic of that time fertile in heroes—a man brave and wise, and magnanimous and just, and self-denying in a degree hardly exceeded by any character in history. He was, besides, the husband of the only and beloved child of the Apostle of God, and their two sons Hassan and Hoosein had been the darlings of their grand-father, who had publicly given them the title of "the foremost among the youth of paradise."

Of these sons, Hassan, the elder, a saint and a recluse, on the death of his father sold his birthright of empire to Moawiyah for a large annual revenue, which during the remainder of his life he expended in works of charity and religion at Medina. In the year A.D. 669 this devout and blameless grand-son of the Apostle of God was poisoned by one of his wives, who had been bribed

his wickedness by Yezd, the son of Mōawiyah and the second of the Umayyad Caliphs of Damascus.

There thus remained, as head of the direct lineage of the Apostle of God, Husein, the younger son of Fatimá and Ali, a brave and noble man, in whom dwelt much of the spirit of his father.

Many years after his elder brother's murder, in the year 680 of our era, yielding to the repeated entreaties of the chief Moslem people of Irak Arabi, (or Mesopotamia), who promised to meet him with a host of armed supporters, Husein set forth from Medina to Cufa to assert his right to the caliphate against the hated Ommeiades. He crossed the desert with only a feeble train—his wife, his sister Fatimá, two of his sons, and a few armed horsemen, when on reaching Kerbela, then a desert station about a day's journey from the west bank of the Euphrates and in the near neighbourhood of Cufa, he found drawn up to meet him a host, not of retainers, but of foes. The narrative of what follows is among the most pathetic in all history. The noble son of Ali and Fatimá, the favourite grand-son of the Apostle of God, after deeds of valour romantic even in an Arab of that age, fell pierced through and through with the arrows and javelins of the cowardly assailants who did not dare to come within the sweep of his arm. One of his sons and a nephew had already been slain in his sight. His other son, his wife, and his sister were carried away captive to Damascus. They smote off the head of the son of Ali, and paraded it in triumph through the streets of Cufa. As it passed along, the brutal Obiedollah, the governor of the city, struck the mouth of the dead man with his staff. "Ah", cried an aged Mussulman whom horror and just wrath made bold, "What a foul deed is that!—on those lips I have seen the lips of the Apostle of God."

This tragic event stirred the heart of Islám to its very depths, and even now, after the lapse of nearly 1,200 years, it separates, as from the first it separated, the Mahometan world into the two great and hostile divisions of the Sunis and the Shiás,—of the Sunis, who bless the memory and are zealous in the cause of Ayesha and Abubekr and Omar and Osman—and of the Shiás, who execrate the memory of the three first caliphs, and, hardly in a less degree, that of Ayesha herself; who by degrees have come to regard Ali as something more than mortal—as not only the Vicar, but in some mystic sense an Incarnation of God; who venerate Fatimá as the first among women; and yearly celebrate the martyrdom of Husein, not only with the outward signs but with the inward reality of lamentation and mourning and woe.

It was on the tenth day of the month Moharram (which happened to coincide with the 9th of October of the year 680 of our era) that Husein fell martyred on the sands of Kerbela. The Mahometan year being lunar, and ours solar, the tenth day of the Moharram occurs at various periods of our calendar; but, whenever it comes round, in all parts of Asia where Shiás are to be found, it is observed as a day of sorrow and of tears and of beating of the breasts in grief.

In Persia—which (with a brief exception under Nadir Shá from A.D. 1736 to 1747) has, ever since the accession of the Saffevi dynasty at the commencement of the 16th century of our era, been the great Shiá empire, and whose

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population has consequently been able, without dread of Suni persecution, to indulge freely in the expression of its love and sorrow for the martyred son of Ali and Fatimá—the celebration of the Moharram is a national ceremony of mourning, conducted in the capital of the Shá-in-Shá (king of kings) with a solemn magnificence that, with all its pomp, cannot deaden, or even tone down, the hysterical passion with which even strong and brave men listen to the oft-recited story of the great martyrdom (*see Chardin, Potter, Morier, and other travellers in Persia*). In India, where the Shiás have always been comparatively few and the Sunis many and powerful, the Moharram is celebrated, by the Sunis with riot and ill-managed merriment; with ribald jests, and the coarse antics of mountebanks dressed up in the skins of wild beasts; the Shiás, on the other hand, assemble sadly in their houses, or their Imámbarás, where they listen with tears and loud sobbings to the pathetic story; or, if they join in the procession at all, and are not interfered with by the regulations of the police (as has latterly been the case in Bombay), they lead along, mourning and beating their breasts as they go, a riderless white horse, representing that from which Hoosein, parched with thirst, dismounted to take his last cup of water at his tent door, when the remorseless and accursed Shamer shot through his lips with an arrow as he drank, and mingled his dying blood with the draught (c).

The neighbourhood of Kerbela is to the Shiás what the neighbourhood of Jerusalem was to early Christendom.

Near Nijuf, a day's journey from the west bank of the Euphrates and about 120 miles south-west of Bagdad, rises *Meshed Ali*, the superb mausoleum of the husband of Fatimá, the companion and the son-in-law of the Apostle of God.

About another day's journey to the north-west of Meshed Ali, still on the same or western bank of the great river, at Kerbela, now a place of considerable size and importance, is *Meshed Hoosein*, the holy sepulchre of Hoosein, the "Shehad" or martyr.

These tombs (though standing in the territories of the Suni Turks) have from time to time been adorned with the utmost magnificence by the Shiá sovereigns of Persia, and they are constantly attended by a large body of Syuds (descendants of Ali), whose services are largely rewarded by the pious benefactions of the faithful.

From all parts of Asia and at all periods of the year a constant stream of Shiá pilgrims flows towards these holy tombs. Nor is it the living only who crowd there: the fondest wish of wealthy and pious Shiás at the approach of death, is to be buried in the sacred dust that surrounds the tombs of Ali or of Hoosein; and from the river-bank long strings of camels may be seen traversing the sands towards the holy places laden with the coffins of the devout votaries, who are thus making their last pilgrimage to Nijuf or to Kerbela.

The sacred dust of Kerbela is made into moulds (called in India *Mokurs*, from their resemblance in shape and size to pieces of coined money), and into

(c) Ockley's Hist. of the Saracens, Dynasty of the Ommiads. Yesid I, Gibbon's Decline and Fall of the Empire Ch. 50.

strings of large beads. Whenever the Shiá prays, which he does three times a day, (at sunrise, noon, sunset,) not five times a day, as the Sunis do, he is careful to put his mohur, or mould of the dust of Kerbela, on the ground, so that it may meet his forehead in the act of prostration; and, when in prayer he names the name of God, he touches one of the beads fashioned out of the dust of Kerbela that are strung on his rosary. On more solemn occasions, such as at the new moons, the Ramazan, or the Moharram, the Shiá is in the habit of partaking of a sort of sacramental cup consisting of water mingled with the dust of Kerbela.

In short, the whole religious life of the Shiá is completely steeped in a current of thoughts, beliefs, traditions, and observances, which all have their source in Ali and Fatimá, and their two sons Hassan and Hoosein—the four venerated names which with that of the Apostle of God compose the *panchton* (or Pentad) of the *Ala Saba*, or Holy Family of Islám.

Now all this the Sunis regard as so much deplorable superstition. They tell you, indeed, they respect Ali as the son-in-law of the Apostle of God and as a good man, the solemn cursing of Ali, however, was continued long after the accession to power of the Suni line of the Abbasside caliphs, the successors of the Ommeiades (*f*); but to revere Ali as the Vicar of God, still more as an Incarnation of God, is utterly abhorrent to all the religious feelings of a pious and orthodox Suni. To go on pilgrimage to Kerbela, to bow the forehead in prayer on moulds made of the dust of Kerbela, to drink, on the great Mahometan anniversaries, water mixed with the dust of Kerbela—these are all practices which a Suni Mussulman shrinks from as so many forbidden superstitions.

The Suni prays five times a day; the Shiá only three times: the Suni with his arms folded across his breast; the Shiá with his arms held straight down by his side: the Shiá venerates Ali and Fatimá as something more than mortal, and execrates the memory of Abubekr and Omar and Osman; the Suni pays sincere reverence to these three caliphs, and introduces their names into the Khootheh (or Friday prayer), and into the dedicatory inscriptions in his mosques: the Suni, in India at least, celebrates the Moharram with ribald buffoonery; the Shiá with heart felt lamentations.

In a word, agreeing in reverencing Mahomet as the Apostle, and the Koran as the word, of God, the Sunis and Shiás agree in little else except hating each other with the most cordial and bitter hatred. The quarrel of Ayesha and Fatimá is an undying one, and Islám is still divided by the fierce enmities of the respective partizans of the favourite wife and of the only daughter of the Apostle of God.

The next question is, *Who are the Shiá Imámi Ismáílis?* Formally they are those among the Shiás who hold Ismáíl, the *seventh* in descent from Ali, to have been the last of the revealed Imáms; and who also hold that, until the final manifestation of Ali who (as an Incarnation of God) is to come before the end of all things to judge the world—the musnud of the Imámate or in Latin idiom the office of Supreme Pontiff) is rightfully held by an

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The *revealed* Imáms, according to the Ismáílis, are these seven—1, Ali; 2, Hassan. 3, Hoosein. 4, Zeináledeen (this was that son of Hoosein who survived the massacre of Kerbela). 5, Mohammed Baquer. 6, Ismael Seeduck. 7, Ismail (who died before his father, and is called, from his father's name, Ismáíl-bin-Jaffir Seeduck).

Under the dominion of the earlier Abassides (the caliphate of the Abassides of Bagdad extended from A.D. 750 to A.D. 1272), the Ismáílis, like all other opponents of the Suni or orthodox faith, were exposed to severe persecution. Their doctrine of the Imámate made them peculiarly obnoxious. As already explained, every caliph, or successor of the Apostle of God, held, as part of his sovereignty, the office of *Imám-al-Moslemín* (Supreme Pontiff of the Devout); so that the doctrine of the Ismáílis, in the eyes of the Suni princes, was not only heresy in religion, but *treason against the State*.

The result was that, from the beginning, they were compelled to teach and spread their tenets secretly.

In all essentials the Ismáílis were Shiás, but they held in addition certain peculiar tenets, such as this respecting the Imámate, which would appear to have been first formulized into a regular system (with different ascending degrees of initiation and stages of more or less esoteric doctrine) about the beginning of the 10th century of our era by the famous Abdallah-bin-Maimun, who taught first at Abwas, in the south-west of Persia, and afterwards at Salemieh in Syria (*g*). Abdallah-bin-Maimun, together with several tenets derived from the Magians or Zoroastrians, is said to have adopted from the Hindu philosophy, and to have engrafted into the higher stages of the Ismáíli initiation, certain principles of pantheism which by doing away with the notion of a personal God and personal conscious immortality, are easily represented as involving the doctrine of human non-accountability and even that of the moral indifference of actions—a reproach frequently brought, but apparently without good reason, against the more esoteric teachings of the Ismáíli system.

One of the initiated disciples of Abdallah-bin-Maimun—himself a lineal descendant from Ismáíl (*h*), the 7th Imám—the Dai Abdolla—or Obeidollah, about the middle of the 10th century of our era, laid in Africa the foundations of what afterwards became the *Fatimite Caliphate of Cairo*, and which lasted till overthrown by the orthodox Suni Saladin (the chivalrous rival in arms of Cœur de Lion) about the year of Christ 1171.

This Fatimite Caliphate was a *dynasty of Ismáílis*; it was named after Fatimá, the wife of Ali and sole daughter of the Apostle of God, from

(*g*) Von Hammer's Hist. of the Assassins, translated by Dr. Wood. Edn. of 1835, London, p. 25.

(*h*) *Ibid*; see also De Sacy Exposé de la Religion des Druzes. Edn. of 1838, Paris.

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whom the Caliphs traced their descent through Obeidollah and Ismâ'il, the 23d Imam.

Under the dominion of the Fatimite Caliphs, the religious system of the Ismâ'ilis, with its secret lodges, its many stages of initiation, and its secret mystic ceremonies, was matured and perfected.

It is not necessary to go into the details of these developments. Von Hammer's "*History of the Assassins*" (translated, not with any great felicity, by Dr. Wood); Silvestre de Sacy's "*Religion of the Druses*"; the *Dabistan* and other oriental authorities cited at the bar, by the exhaustive industry of Mr. Anstey on the one side and Mr. Howard on the other, supply ample materials for a dissertation on a subject of considerable interest, both historical and theological, for which, however, this is not the place.

Two points, however, connected with this part of the subject have such an important bearing on the main question at issue in this case, that they must be noticed with some degree of attention.

These two points are, *first*, the universal prevalence among the Ismâ'ilis of the practice of "*Takiah*," or concealment of religious opinion; *secondly*, their method of seeking to make converts by assuming to a great extent the religious standpoint of the person whom they desire to convert, modestly hinting a few doubts and difficulties, and then, by degrees, suggesting, as the only possible solution of these, the peculiar tenets of their own system.

As to the *first* point, the word "*Takiah*" was of constant recurrence in the evidence taken in this suit; it was rendered, not perhaps quite adequately, 'mental reservation';—its full meaning is something more than that. It is an Arab word, whose root-meaning is "fear or caution": its full-applied meaning is "concealment of a man's own religious opinions and adoption of alien religious forms,"—either from a desire to avoid giving offence or from dread of persecution.

The polite Orientals (the Suni Mussulmans excepted) willingly sacrifice some of their religious scruples, and conceal a portion of their religious zeal rather than hurt the feelings of those opposed to them in religious matters. This sort of religious comity is not absolutely confined to the East; even British Protestants of the laxer sort are, I believe, occasionally known in Catholic countries to raise their hats, or otherwise show some token of outward respect, as the more solemn processions of the Romish Church pass by. This is "*Takiah*," outward conformity, in order to avoid giving offence, or hurting the religious feelings of others.

Of the "*Takiah*" caused by the dread of insult or persecution, a familiar and amusing instance may be found in the demeanour of those Shiâs who make the Hadj—i.e., go on pilgrimage to Mecca. In that centre of Suni bigotry and intolerance the Shiâ pilgrims out of "*Takiah*" abandon their customary times and forms of prayer, praying five times a day with arms crossed, instead of three times a day with arms held straight down to their sides. Captain Burton in his very interesting "*Pilgrimage to Mecca*" describes with considerable humour how the Shiâ pilgrims even force themselves to pay out-

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ward and most reluctant homage to the tombs of Abubekr, Omar, and Osman—the bitter foes of their venerated Ali, and the objects of their own most uncompromising and religious hatred. This is "*Takiah*," adopted with the view of avoiding persecution, insult, or ill-usage for religion's sake.

The peculiar tenets of the Ismā'ilis with regard to the Imāmate, imposed upon them a peculiar reason for practising "*Takiah*" in all countries within the sway of the Suni caliphs; this long-enforced habit grew at last into a second nature, and the practice of "*Takiah*" became universal among the Ismā'ilis—the offspring of persecution and fear.

The other peculiarity of the Ismā'ilis—that, namely, of assuming or admitting the truth of the greater portion of the religious tenets of those whom they wished to convert to their own—is copiously illustrated by Silvestre de Sacy (i), citing from an Ismā'ili work of authority, the *Kitub-al-siyaset*, which contains, among other things, instructions for the proceedings of the *Dais* or missionaries of the Ismā'ilis.

If the *Dai*, or missionary, has a Shiā (not of the Imāmi Ismā'ili persuasion) to deal with, he is to represent himself (as in this case he might do with perfect truth) as a zealous partisan of all the Shiā doctrine. He is to dwell with uncton on the cruelty and injustice with which the Sunis treated Ali and his sons—on the martyrdom of Hoosein and the captivity of his family. He is to abuse the Suni caliphs of both lines, the Ommeiades and the Abassides, and then, having thus prepared the way, he is to insinuate, as the necessary completion of the Shiā system of faith, the more esoteric doctrines of the Ismā'ilis.

Is it a Jew he has to deal with?—he is to speak disparagingly of the Christians and the Mussulmans, to agree with his intended convert in still looking forward to a promised Messiah, but by degrees to bring his mind to the persuasion, that this promised Messiah can be none other than Ali, the great Messiah of the Ismā'ili system.

If it be a Christian he hopes to bring over, he must expatiate on the obstinacy of the Jews and ignorance of the Mussulmans, must profess his reverence for all the chief articles of the Christian creed, but gently hint that they are symbolic, and point to a deeper meaning, to which the Ismā'ili system alone can supply the key; he may suggest that the Christians have somewhat misinterpreted the doctrine of the Paraclete, that a Paraclete there is, and that it is to this—the true Paraclete—that the *Dai*, or missionary, would lead his enquiring friend.

It is needless to pursue these illustrations at greater length.

Two points may be taken as conclusively established with regard to the Ismā'ilis:—

1. That they habitually enjoined and carried out the practice of "*Takiah*," i.e., concealment of their own peculiar views in religion, and outward adoption of religious forms not their own.

2. That their *Dais*, or missionaries, were directed, as a general rule, to set about the work of making converts by assuming to a great extent the religious stand-point of those whom they wished to bring over to their own faith.

(i) Religion des Druzes. Vol. I., Introduction, pp. 148-163.

Both these points will be found to have an important bearing on the appreciation of the evidence adduced in this case.

And now we must notice a curious passage in history which connects the principal defendant in this case, Agá Khán, with the "*Sheikh el Jubal*," or "*Old Man of the Mountains*" of Marco Polo—with the Chiefs or (according to Von Hammer) the hereditary Grand Masters of the *Assassins of Alamut*.

After the Ismáili system had been elaborately completed at Cairo under the Fatimite Caliphs, receiving there a superstructure of Egyptian hierophantism upon the basis of Magian and Indian dogma, which it had derived from its Persian founders, it had the fortune, a little after the middle of the 11th century of our era—about the time that William the Norman was winning the battle of Hastings—to attract the attention of a very accomplished young Persian of Arabian descent and of Shiá faith, who had already given promise of a brilliant career.

This was *Hassan-bin-Saba*, the son of a learned Shiá doctor of the city of Rhai in Persia.

Hassan-bin-Saba had been carefully trained in all the learning of his time, his great friend and fellow-student being Nizam-ul-Mulk, afterwards the renowned minister of Togrul Beg and of Malek Shah, the two first of the Toorki or Seljukian Sultans of Irak, whose seats of empire were Nisabhur and Rhai. In his early manhood Hassan-bin-Saba met with, and had been deeply impressed by the teachings of a Dai, or missionary, of the Fatimite Ismáilis. An adventurous life of action had weakened, but not effaced, these earlier impressions when, being checked in his career of ambition by the superior fortunes of his rival Nizam-ul-Malek, he resolved to repair to Egypt in order to be instructed at the fountain-head in the more esoteric doctrines of the Ismáilis.

A three-years' residence in Cairo made him an adept and an enthusiast in the Ismáili faith, and he returned to Persia eager to propagate the tenets he had embraced.

Persia at that time was in the most rigid bonds of Suni orthodoxy, the Shepherd Chiefs of Central Asia (and such in their origin were the Seljukian Sultans of Irak) having always been among the most devoted upholders of the strictest traditions of Islám.

Hassan-bin-Saba soon found that he could only attempt openly to propagate his new creed at the imminent risk of his life. He formed his plan. Partly by force and partly by fraud he possessed himself of the impregnable mountain stronghold of Alamut (*the Vultures' nest*) built on a commanding crag on the Elburz mountains—the range that separates from the rest of Persia the provinces that lie immediately to the south of the Caspian.

Here he established himself in the year 1090 of our era just 700 years, as Von Hammer is careful to inform us, before the commencement of that other great combination (as he views it) against the established order of society—the Constituent Assembly of revolutionary France.

Here, for 35 of the remaining years of a life which was protracted beyond the age of 90, Hassan-bin-Saba employed all the remarkable powers of his

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mind in organizing a system of terror which fought with the dagger against the sword, and revenged persecution by *assassination*. He and his successors have the infamous renown of having introduced *that* word into the vocabularies of Europe. It is likely enough, indeed, that the etymology suggested by Silvestre de Sacy may be correct, and that the word by which the Isma'ili of Alamut and Massiat were designated in the Eastern languages was *Hashishin*—a word derived from the use of the *Hashish* (a preparation of hemp, or bhang,) with which Hassan-bin-Saba and his successors enlured the souls, while they inflamed the energies of the *Fedawi*, "the self-offering or devoted," whom they employed, to use the language of Dryden, as their "blind, unthinking instruments of death." Be this as it may, the word *Assassination* has long been naturalized in all the languages of Europe to signify the vilest sort of murder—murder done to order.

I must resist the temptation of pursuing in further detail the story of the Isma'ili of Alamut, whose offshoot the Assassins of Massiat (a corresponding rock-fortress on the mountain range north of Lebanon) were the terror of Syria and Western Asia during the second Crusade. I take up the thread of the narrative where it becomes connected with the principal defendant in this suit, Agá Khán, as it does in the person of Hassan-Ala-Sikrihi-es-Salam (or Blessed-be-his-name), shortened into *Zakaresalam*, the 4th in succession from Hassan-bin-Saba, of those whom Von Hammer calls "the hereditary Grand Masters of the 'Order of the Assassins of Alamut.'"

The founder himself, Hassan-bin-Saba (that is "of the line of Saba") though a fanatic Isma'ili in religion, was not—as his family name shows—an Isma'ili by birth: he was not a descendant, either lineal or collateral from Isma'ili, the 7th Imám, the son of Jaffir Seeduck.

Hassan-ala-Zakaresalam, on the other hand, asserted for himself a direct lineal descent from Isma'il, the 7th Imám, through Nisar, a son of Mostansir (one of the Fatimite Caliphs of Egypt) who had been brought to Alamut in the time of Hassan-bin-Saba, and whom Zakaresalam declared to have been his progenitor.

Von Hammer, drawing exclusively, as he admits, from Suni sources, leaves this statement of paternity involved in great doubt and obscurity, which is certainly not cleared up by the passage extracted from the 10th book of the Persian History, of which a translation was put in by the relators and plaintiffs. The mystery that hangs about the story seems in some degree to justify the expression of Witness No. 1, when he said that he had come to doubt the validity of Agá Khán's hereditary claims (from Ali and Isma'il through the Fatimite Caliphs of Cairo) ever since he had found that he traced his pedigree through this Zakaresalam.

This is not the place, of course, for any attempt to clear up the obscurity of an Asiatic pedigree (a task which even Gibbon was obliged to renounce as hopeless), but it may be observed in passing that the recorded follies of this Zakaresalam are such as to make it *prima facie* not unlikely that he might really have been a blood descendant from the Fatimite Caliphs of

Egypt, among whom are to be found, as notably in the case of Hakim-Biamr-Allah, the Mad Messiah of the Druzes of Lebanon, some of the most fatuous and extravagant of all the Mussulman princes who have ever ruled in any part of the East (j).

By one of his proceedings, Zakaresalam excited more horror among orthodox Mussulmans than had been called forth even by the organized system of assassination established by the Chiefs of Alamut. On the 17th day of Ramazan he caused a public pulpit to be raised in the *Mosella*, or place of prayer at the base of the castle of Alamut, and thence proclaimed himself the Viceregent of God, abolished all Moslem ordinances of positive religion, declared that that sacred day of the Muhamadan calendar should thenceforth be celebrated as the *Feast of the Revelation of the Imám*, and that the people should then and there (as, from the narrative, they appear to have done without much scruple) eat the flesh of the swine and drink, even to drunkenness, of the juice of the grape.

After a short reign of about four years this self-asserted, and certainly worthy, descendant of Hakim-Biamr-Allah was himself cut off by the dagger, and the hereditary Grand-mastership of the Assassins of Alamut passed through the hands of four successors, (all of whom, with one, probably accidental, exception, are recorded in the pedigree of Agá Khán), until the year of Christ 1258, when Alamut fell to rise no more (it has ever since been a heap of ruins) under the irresistible might of Holagou, one of the grand-sons of the great Zinghis Khán (k). Although, by this utter overthrow, in which men, women, and children were unsparingly put to the edge of the sword, the Assassins of Alamut ceased to be a terror to Asia, yet the race of the Ismáílís still survived in Persia, and the hereditary succession of their *unrevealed* Imáms is traced in unbroken line down to Agá Khán, the first defendant in this suit, in the pedigree already referred to. Of these names, history knows nothing; one, indeed, Shah Islam Shah the 14th in the ascending line from Agá Khán, is currently mentioned by a tradition, very prevalent in the Khojá caste, as the Imám of whom Pír Sadrdin, the converter of the Khojás, was the missionary or Dai. It appears probable that from the time the rulers of Persia became Shiá, as they did from the establishment of the Saffevi dynasty about the commencement of the 16th century of our era, all active persecution of Ismáílís ceased. After the troublous times of the Affghan invasion and of Nadir Sháh, and during the period preceding the rise of the present or Kajar dynasty, when the Zend princes had the principal power in the south of Persia (say from A.D. 1750 to A.D. 1786), we find that Aboul Hassan, the grand-father of Agá Khán, was governor of the very important city of Kerman.

About the year 1813 Macdonnell Kinner, as cited by Von Hammer (l), notes in his "Topographical History of Persia" that in the district of the

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(j) "The Fátimities," says Gibbon, "were either rascals or pusillanimous." "Decline and Fall," Ch. 52. See Silvestre De Sacy's *Religion des Druzes*.

(k) The Assassins of Massiat and other rock-forts in Syria were suppressed by the Mamlik Sultans of Egypt about A.D. 1280.

(l) Hist. of the Assassins, pp. 210-211.

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Persian highlands (or *Kuhistan*), especially near the ruins of Alamut, are still to be found a remnant of the *Ismáilis* who go by the name of *Hooseinis*; he also remarks that the *Ismáilis* of Persia recognize as their chief an Imám "dwelling near Kekht" whose descent they deduce from *Ismáil*, the son of Jaffir Seeduck, and that as this Imám, according to their doctrine, is an emanation from the Deity, the *Ismáilis*, some of whom are dispersed as far as India, go on pilgrimage "from the banks of the Ganges or Indus" to obtain his benediction.

These statements, read by the light which the evidence in this case throws upon them, are not without interest. The *Hooseinis*, who still dwell about the ruins of Alamut, are of the race who regard as their Imám the first defendant in this suit, whose own proper name, as distinct from his titular designation, is "Mahomed Hussain *Hooseini*." The Imám of the "*Ismáilis* dwelling near Kekht," at the time of Macdonnell Kinneir's stay in Persia, was Sha Khalilulla, the father of the first defendant. The votaries who went on pilgrimage from India to receive his benedictions, consisted mainly of the *Khojás*, who, as we shall soon see, had for a long period of time been in the habit of making pilgrimages to what they called *Durkhana*, i.e., to the head-quarters, or principal residence for the time being, of their *Murshed*, or Spiritual Head, the Hereditary Imám of the *Ismáilis*.

The question *Who is Agá Khán?* has thus already been partly answered. "Mahomed Hussain *Hooseini*, otherwise Agá Khán," or, as he is more formally styled when addressed or mentioned in official documents by the Bombay Government, "His Highness Agá Khán, Mehelati," is the hereditary chief and unrevealed Imám of the *Ismáilis*—the present or living holder of the Musnud of the Imámate—claiming descent in direct line from Ali, the Vicar of God, though the 7th and (according to the *Ismáili* creed) the last of the *Revealed* Imáms—*Ismáili*, the son of Jaffir Seeduck.

His own personal history has been somewhat adventurous and romantic. His grand-father Abdul Hassan, as already mentioned, was governor, under the Zend princes, of the important city of Kerman. On quitting that office, Abdul Hassan went to reside in the district of Mehelati, where the family appears to have long had considerable possessions, and whence Agá Khán derives his territorial title. Mehelati is between Hamadan (the old Ecbatana of the Medes) and Koom, the latter a city about midway between Ispahan and Teheran, and important as the burial-place of more than one of the Shás of the Saffevi dynasty (the "*Sofis*" of Shakespeare); of Fatimá, the daughter of Imám Resa, the great saint of Persia; and more recently of Futteh Ali Shá, the 2nd in succession of the Kajar, or now ruling, dynasty, who after a long reign extending from A.D. 1798 to A.D. 1834 lies buried here in one of the most superb mausoleums that have ever been raised even to a Moslem prince.

The father of Agá Khán, Sháh Khalilulla, having for a time taken up his abode at the city of Yezd, the principal seat of the *Pársis* (the remnant of the Magians or Zoroastrians of ancient Persia), was slain there, with several of his house-hold, in the year of Christ 1817, in the course of one of those tumultuary brawls which are not uncommon among the lawless

mobs of the ill-policed Persian cities. "The news of this event," says Mr. Watson in his recent History of Persia (*m*), "was received with the greatest concern by the Sháh, who dreaded lest he should be held responsible by the dangerous sect of the Ismáílís for the death of their sacred chief." Futtéh Ali Shah accordingly caused severe punishment to be inflicted on all the chief assailants in this murderous fray, and he conferred on the young Agá Khán (the successor of his father in the Imámate) large possessions in addition to those which had descended on him through his ancestors, the government of the entire district of Kocm and Mehelati, and the hand of one of his daughters in marriage.

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From this period (say 1818) till the year 1838 nothing more is recorded of Agá Khán. That (1838) was the year in which Mahomed Ali Shah, the 3rd in succession of the Khojá dynasty (he reigned from 1834 to 1848), retreated from the disastrous siege of Herat so memorably defended by Eldred Pottinger.

In that year Agá Khán raised the standard of revolt and seized the government of Kerman, where his grand-father had once presided, and where he himself had numerous adherents.

Mr. Watson (*n*) states somewhat vaguely, as the reason for this rising, that the Agá "thought the time had now come when he might assert with advantage the religious character of which he was inheritor." The native Persian historian assigns what is, perhaps, a more probable reason. Hadji Mirza Ahasi, who had been the tutor of Mahomed Ali Shah, was during the whole reign of his royal pupil (from 1834 to 1848) the prime minister of Persia. A Persian of very low origin, formerly in the service of Agá Khán, had become the chief favourite and minion of the all-powerful minister. This person, through his patron, had the impudence to demand in marriage for his son one of the daughters of Agá Khán—a grand-daughter of the late Shah-in-Shah! This, says the Persian historian, "was felt by Agá Khán to be a great insult," and the request, though strongly pressed by the prime minister, was indignantly refused. Having thus made the most powerful man in Persia his deadly enemy, Agá Khán probably felt that his best chance of safety was to assert himself in arms—a course not uncommon with the great feudatories of disorganised Persia. Making Kerman his head-quarters, he appears to have kept up the fight with various fortunes through the years 1838-39 and part of 1840. In the latter year, overpowered by numbers, he was forced to take to flight and with difficulty made his escape, attended by a few horsemen, through the deserts of Beluchistan, to Sind, where he appears to have been hospitably received by the Talpúr Ameers. In Sind he would, of course, find no money difficulties to contend with. The Khojás of that province (numbering nearly 3,000 houses or families) have always been among his most zealous adherents, and from them and his other Khojá devotees in various parts of India and the East, there can be no doubt, he received ample supplies. That extraordinary levy the "Bukkas"—which the witness No. 24 (the Agá's Kamaria or Collector General for all Sind) describes,

(m) Edn. of 1866 London, Vol. I., p. 192.

(n) Hist. of Persia, p. 331.

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as a payment by Khojás to their spiritual head "*of a tenth of their whole possessions*"—was probably last resorted to at this period of emergency and distress. "No order for such a levy," said this witness, "has been made for the last twenty-seven years," an answer implying that it had been made then, which would be about the years 1839-40.

Supplied with such resources, Agá Khán was able, during his residence in Sind, to raise and maintain a body of light horse, who, during the latter stages of the Affghan war (in 1841 and 1842) were of some service both to General Nott in Candahar and also to General England in his advance from Sind to join Nott. For these services and for others which he was enabled to render to Sir Charles Napier in his conquest of Sind in 1843-44, Agá Khan received, and it seems still enjoys, a pension from the British Government of India (*o*).

In 1845 Agá Khán came to Bombay, where, as appears from the evidence of witness No. 14 and No. 18, he was received by the cordial homage of the whole Khojá population of this city and its neighbourhood. With the exception of a certain period of absence at Calcutta in the years 1846-47 and 48 (occasioned, it is said, by the remonstrances of Mahomed Ali Sháh, whose government was uneasy at the presence of the Ismáili chief in a port of such ready access to Persia as Bombay)—with this exception Agá Khán has ever since made Bombay his principal place of residence—his "*Durkhána*" or head-quarters. His habit during this period has been occasionally to preside at the *Jamát Khánd*, or council hall of the Bombay Khojás, on the more sacred anniversaries of the Muhammadan calendar. At the Moharram he attends there with some state to hear the solemn recitation, by Shiá Moolas, of the legend of the Great Martyrdom. On that occasion, at the Ramazan, at the new moons, and on other stated days, he leads the *Nimmáz*, or daily prayer, in the *Jamát Khánd*, and also presides over the distribution of water mixed with the holy dust of Kerbela. Every week on Saturday (when in Bombay) he holds a *darbár* (levee) in the *Jamát Khána* at about 7 or 8 o'clock in the evening, when all the members of the Khojá community who please may attend and have the honour of kissing his hand. The above, taken from the evidence of his very intelligent private secretary, Karrim Khán, appear to be the principal public and religious duties performed by the Agá in Bombay.

His yearly income, derived from his votaries in many various and some very remote parts of Asia, is said, by the same witness, to average a net sum equal to about £10,000 sterling of our money. Of this considerable income the greater portion is spent by the Agá in horse-racing—a pursuit of which in Bombay he is, and for some time has been, one of the principal patrons.

(c) See Major Rawlinson's letter to Mr. Maddock, 6th November 1842; Parliamentary papers relating to military operations in Affghanistan, 1843; Sir W. Napier's Hist. of Sir C. Napier's Administration of Scinde, End. of 1851, London.

The next question is, *Who and what are the Khojás, and what have been their relations with the hereditary Imáms of the Ismáílís, the ancestors of Agá Khán?*

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From the evidence adduced in this case, the more probable conclusion, I think, is that the Khojás were originally Hindus of the trading class, inhabiting the villages and towns of Upper Sind. Their language is Sindi or Cutchee—a cognate dialect, and such ancient religious works as they possess are written in the Sindi language and character. Sind, an early Mahometan conquest (p), has long had a large Mahometan population, but a considerable portion both of the retail and wholesale business of the country has always remained in the hands of the Hindus. The position and circumstances of these remote and isolated Hindu traders were manifestly such as to favour their conversion to some form or other of Mahometanism.

That they were so converted by Pír Sadrín about 400 years ago, is admitted by both the contending parties in the Khojá community. It is also agreed that the tomb of this Pír (or saint) is at Ootch, a town of about 1,800 houses in the Native State of Bhawulpore, on the left bank of the Punjund—the channel through which the collective waters of the five rivers of the Punjab flow into the Indus—and about 40 miles above its point of junction with the latter river. Here the agreement ends; according to the traditions of the great body of the Khojá community, Pír Sadrín came from Khorasan and was an Ismáílí Dai, or missionary, sent by Sháh Islám, one of the ancestors of Agá Khán, and the form of Mahometanism which he taught his converts was the Shiá Imámi Ismáílí faith. According to the relators and plaintiffs, and those of the Khojá community of Bombay who side with them, Pír Sadrín was a Suni, whose place of residence was at Multan, and who converted the first Khojás to Suni Mahometanism.

The term “Khojá” means both “the honourable or worshipful person” and “the disciple.” Its full meaning, as applied to the community converted by Pír Sadrín, may, perhaps, fairly be taken to amount to this, “*the honourable or worshipful converts.*” • It is in this sense that it is to be found used in Von Hammer’s History of the Assassins (p. 75), where he relates how one Khojá Mahomed Sheristani, having been sent from Alamut on some embassy to the court of one of the Seljukian Sultans of Irak at Rhai, was there massacred “on leaving the presence” by the ferocious Suni populace of that orthodox city, who rose *en masse* against the Ismáílí convert or disciple.

From Sind the Khojá conversion would appear to have spread into Catch, thence into Kattywar, and through Guzerát to Bombay. In the

(p) The first Arabian Conquest was as early as A.D. 775; but in 750 the Mahometan conquerors were driven out, and Sind appears not again to have come under Mahometan dominion till the 12th century of our era: Elphinstone’s History of India, p. 258-262 and Appendix, Tit. “Schnee,” p. 628.

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In Sind, as appears from the evidence in this case, they number 2,800 houses or families; in Kattywar about 5,000 families. In Cutch and Guzerát the numbers are not stated, but must be considerable; Bhuj, the capital of Cutch, having long been one of their principal seats. In Zanzibar (on the African Coast) there are 450 Khojá families—in Muscat 400—and so on. In Bombay and its immediate neighbourhood they may probably number about 1,400 families, of whom about 400 side with the relators and plaintiffs, the rest with Agá Khán.

Beyond the limits of Bombay and its immediate neighbourhood no difference of religious opinion appears to prevail among the Khojás. All or the overwhelming majority of the Khojá community in all parts of India and the East, except Bombay, are the staunch adherents of Agá Khán: to take an illustration (which seems to be quite a fair one) from the evidence of witness No. 23, it appears that 445 out of the 450 families who compose the Khojá community of Zanzibar have recently signed a paper of adhesion to the Agá and to the views he is understood to represent.

Wherever a Khojá community is to be found, however small, its organization is the same: it has a *Jamát*, a *Jamát-Khána*, a *Mukhi*, and a *Kamaria*.

The "*Jamát*" is the 'congregation of the people,' the assembly in council of all the adult male members of the Khojá community of the place.

The "*Jamát Khána*" is the council-hall or guild-hall of the community.

The "*Mukhi*" is the treasurer or steward, and the "*Kamaria*" the accountant.

It may as well be mentioned here (as it is the clear result of the evidence, and effectually disposes of the 2nd, 3rd, and a portion of the 6th clause of the prayer of this information and bill) that these two functionaries, the *Mukhi* and *Kamaria*, are not, according to the usage of the Khojá community, elected for any ascertained and fixed period, but appear to hold their office (if they wish so to do) as long as they give satisfaction. Numerous instances were deposed to in which they continued to hold office for several consecutive years—sometimes for life—and one instance, at least, was mentioned in which the father had been succeeded in office by his son. Besides these local *mukhis* and *kamarias*, proof was given that in Sind and Kattywar (it may also be the case elsewhere) provincial *kamarias* are appointed by and hold office under the Imám, for the time being, of the Ismáílis. The duty of these functionaries is to collect and forward for transmission to the Imám, wherever he may chance to reside, the contributions raised on his account by the Khojá community.

It is conclusively shown, partly by direct evidence of account books going back considerably beyond the commencement of the present century (those of Sind to A.D. 1772, those of Kattywar to A.D. 1782) partly by evidence of tradition in the caste or sect as reliable as any other evidence of tradition adduced in this case (quite as reliable, for instance, as that which represents Pir Sadardin to have been the original converter of the Khojás) that, for a time "beyond which the memory of man runneth not to the contrary"—from the origin—from the very outset of their separate existence as a distinctive community—the Khojás have been in the habit of transmitting as to their "Sirkár-Sahib" (lord and master), voluntary offerings (Zakat) out of religious feeling (Dharm) to the Imám for the time being of the Ismáílis, whom they revered as their Múrshed or spiritual head.

The mass of evidence adduced on this point is too strong to be resisted. Even the witnesses called for the relators and plaintiffs were compelled to admit, that, according to the uniform reputation and tradition in the Khojá caste, their fathers "from the beginning" had been in the habit of making voluntary contributions to the fathers of Agá Khán: while the positive evidence adduced on the other side makes it impossible to entertain a reasonable doubt that the Khojás have throughout been in the habit of sending periodical collections to the Imáms of the Ismáílis in Persia, in the earlier and ruder times in the form of coin or treasure sent by special messengers called "Rais") in leathern bags (called "Jowlies"); afterwards, as commercial facilities increased, by means of *hundis* (bills of exchange) principally drawn upon and cashed at Muscat.

Not only were the Khojás, from the first, in the habit of transmitting contributions to the Imáms of the Ismáílis, but it was also, from the origin, a frequent practice with them to make pilgrimages into Persia for the sake of beholding and doing homage to these their spiritual chiefs. This practice also (called pilgrimage to "Durkháná", i.e., to the principal residence for the time being of the Imám) is shown not only by the admissions of witnesses for the relators and plaintiffs, but by the positive testimony of the witnesses for the defendants, to have been, according to uniform tradition in the caste, a practice observed by the Khojás from the earliest times of their existence as a separate community: "From all time our fathers used to go on pilgrimage to Durkháná."

One witness (No. 20) gave a narrative of a pilgrimage of this kind that he made in 1836-37 to Kerman where Agá Khán at the time happened to be residing. The witness, his father and mother, a brother, and two sisters, with a party of about 100 other Khojá pilgrims, sailed from Bombay to Bunder Abbas, a portion of the Persian Coast, near the outlet of the Persian Gulf. This body of pilgrims had offerings with them; in money and rich stuffs, to the collective value of about £2,000 sterling of our money. They stayed some time at Bunder Abbas, waiting for other Khojás to collect there from other quarters, before starting on their tedious and somewhat perilous journey of twenty-one days across the mountain ranges of Southern Persia from Bunder Abbas to Kerman. At length, about 500 Khojás having collected

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from all parts at Bunder Abbas, the caravan was formed, and they made their way to Kerman. There they were lodged, at the expense of the Imám, in a large rude building, built round three sides of a great open court. They stayed in Kerman about a month or six weeks, during which period, having first made their offerings, they were admitted ten or twelve times to the presence of the Imám. "The Aga," says the witness, "sat on his musnud; we beheld his face, kissed his hand, and retired." It was for that they had come, and with that they were well satisfied.

The pilgrimage and the presents cost the witness's father about £500 of our money—a sum which, as the man was only a dealer in grain and dried fruits in a moderate way of business, seems to the modern English mind a somewhat considerable outlay to have made for such a purpose. But the West can never understand the East, especially the modern and mercantile West. To an Englishman of Chaucer's day such an expenditure for such an object might have appeared more intelligible, provided, of course, that the pilgrimage was made to a shrine or saint of Christendom, not of Paynimrie or Heathenesse.

It is not necessary to go into the detail of the different fees—fees on birth, on death, on marriage, at the new moons, &c., of which (as the evidence of the witnesses and of the exhibits shows) the customary or voluntary contributions of the Khojás to their Imám were made up. The principal was the "Dussoon," a percentage on income. This payment has throughout been and still is paid by all Khojás, except those of Bombay. In Bombay it has for some time been resisted, and is now paid here, not as a rule, but as an exception.

It is more important to observe that all these payments are made under headings, such as "Sirkár-Sahib," "Pír Sakámut," &c., which, though varied in form, all indicate one and the same appropriation—an appropriation, namely, to the Imám of the Ismáílis, as the Múrshed or spiritual head of the Khojás.

All the offerings or contributions of the Khojá community appear, from the evidence, to have this primary destination. It is out of the fund thus raised, after consultation with the agent (Warras) of the Imám, that the necessary local public expenses of the various communities are defrayed.

The witness No. 28, a Bombay Khojá and one of those who had never paid the Dussoon, though he was in the habit of paying the other customary fees, said that he paid them "as a matter of *dharma* or religious feeling." "I pay them," he said, "for the Agá; if I knew they went to any one else except our Múrshed (spiritual head) I would not pay anything at all."

Allárahia Sumár (No. 18), the *Mukhi* of the Khojá *Jamát* of Bombay, a very respectable and reliable witness, said: "It has been ordained from the beginning that whatever funds are collected, should go to the Múrshed—the Múrshed and the *Jamát* (the spiritual head and the assembly of the

Khojás) are identical. If the *Mukhi* and *Kamaria* did not hand over the monies to the *Agá*, the Khojá community would pay no more fees."

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Witness No. 20 said: "All the expenses of 'the estate account,' of 'the estate expenditure account' and of the '*Jamát Kháná* account,' are defrayed out of fees paid on 'Sirkár-Sahib's (the Imám's) account.'" And the truth of this statement is completely borne out by the voluminous translated entries from the books which have been filed in this suit among the exhibits for the defendants.

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To the same effect is the evidence of witnesses No. 24 and No. 25. This latter witness, the *Kamaria*-general for the province of Kattywar, says: "All the *Jamát Khánás* in Kattywar are built and purchased by the consent of the *Warras* (agents) of the *Agá* out of Sirkár-Sahib's money, and are entered in an account called the '*Jamát Kháná* account.' All the Khojás in Kattywar know that their contributions go (primarily) to the *Agá*; otherwise they would not pay a pie."

It is not necessary to cite further from the evidence on this point; a full consideration of the whole mass of it (and very voluminous it is) has led me clearly to the two following conclusions:—

1. That, except the comparatively small numbers of Bombay Khojás who form the party of the relators and plaintiffs, the Khojá community would make no contributions at all for public or caste purposes except in the name and primarily on account of their Sirkár-Sahib, the Imám of the *Ismáílis*.

2. That the great bulk of the so-called public property of the Khojá community, both in Bombay and elsewhere, has been acquired by monies paid out of this Sirkár-Sahib's fund, with the approval and consent of the properly constituted local agents of *Agá Khán* and his predecessors.

As a rule the Khojás have no musjids or mosques—in fact, the only Khojá musjid till very recently in existence was that erected in A.D. 1822 in the Khojá burial-ground of Bombay. The *Nimmáz*, or daily prayers, among the Khojas are repeated, or, as the approved phrase seems to be, performed in their *Jamát Khánás*: and in order to complete the proof of the close and peculiar connexion subsisting between the Khojás and their *Márshed*, the Imám of the *Ismáílis*, it may here be mentioned that the pedigree from Ali through *Ismáíl* of the Imám for the time being, is chanted three times a day as part of the service of the daily prayer or *Nimmáz* in a form of words called the "Dowa" throughout all the *Jamát Khánás* of the Khojá community, including the *Jamát Kháná* of Bombay.

Such, then, in its origin and its past and present relations with the hereditary Imáms of the *Ismáílis* appears to me upon the evidence to be and to have been the Khojá community.

The next point to consider is—what have been the relations of *Agá Khán* himself with the particular *Jamát*, or community of the Khojás of Bombay?

His first recorded intercourse with them was one of controversy and strife. In 1829 the same party that are now represented by the relators and plain-

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tiffs, headed by Habib Ibráhim, the father of Ahmed Habibbhái (the most active and influential among the present relators and plaintiffs), resisted the customary payment of the *Dussoon*, or percentage on income. Agá Khán, in order to overcome this opposition, sent to Bombay as his special agent one Mirzá Abdul Kássim, accompanied by a very energetic lady, the Agá's maternal grand-mother, Marie-Bibi, who herself appears to have harangued the Bombay Khojás in *Jamát Kkánd* assembled, and with very considerable effect, in support of the claims of their Múrshed. It was in the course of these proceedings that the bill of A.D. 1829 was filed for the purpose of enforcing these payments by a decree of the late Supreme Court. Agá Khán (in the 4th paragraph of his answer) has denied that this suit was filed with his authority; but a power of attorney sealed with the seal of the Agá clearly recites "that as in Bombay some reprobate persons had laid the foundations of disobedience, it is necessary that he (Mirzá Abdul) do bring an action in the English Court." Authority having been thus formally given, the suit was filed, but it was not proceeded with, the bill having been dismissed for want of prosecution on the 22nd July 1830.

I do not think much importance can fairly be attached to the circumstance of filing this bill. Agá Khán, a Persian nobleman, then resident in Persia, was in all probability very imperfectly informed as to the inferences that would be drawn in an English Court from the attempt to enforce by legal process such payments as these. As he did not prosecute the suit, the fair and reasonable inference is, that, on being more correctly informed, he found he had adopted a mistaken course, and consequently abandoned the proceedings. What is certain is, that after abandoning the suit he directed the recusants to be summoned before the *Jamát* of Bombay, and, on their continued refusal to pay the fees demanded of them, to be turned out of caste. Accordingly in A.D. 1830 Hábib Ibráhim and his partizans, called from their then number the *Bárbháí*, or twelve brethren, were outcasted by the whole Khojá *Jamát* of Bombay in *Jamát Khánd* assembled. In A.D. 1835 they, on their own petition and by the direction of the Agá, were re-admitted on condition of paying (which they did) the arrears of contribution due from them, and engaging in future to pay all the customary fees that should thenceforth be demanded of them on account of the Sirkár-Sahib.

From this time till the Agá's arrival in Bombay in 1864 there is no record of any further disturbance in the community.

During the absence of the Agá in Calcutta in 1846-47 and 48, a litigation was carried on and concluded, which again divided the Khojás of Bombay into two hostile parties; it was the well-known case as to the rights of female inheritance among the Khojás (called *Sajun-Mir-Ali's case*) in which Sir Erskine Perry in 1847 pronounced a learned judgment (founded on the evidence of caste usage and custom) against the rights of Khojá females to inherit according to the rules of Mahomedan law (q).

In this litigation the Agá, then represented in Bombay by his brother Mahomed Bauker Khán, had endeavoured to uphold the rule of inheritance as laid down in the Koran, Habib Ibráhim and the party of the *Bárbhái* took an active part on the other side.

This was the commencement of fresh feuds, leading, in 1848, to a second excommunication of Habib Ibráhim and his supporters, followed by a general secession of the *Bárbhái* party from the body of the Khojá community—the seceders establishing themselves in a new *Jamát Kháná* in a different part of the Native Town.

In 1850 a deplorable event, arising out of these feuds, occurred in the *Jamát Kháná* at Mahim. Four Khojás of the *Bárbhái* party were murdered there by several Khojás of the opposite faction, nineteen of whom were tried for the offence before the late Supreme Court in the December sessions of 1850, and four capitally sentenced and hanged.

From the reluctant admissions of witness No. 20, himself one of those who were arraigned, but acquitted, on that occasion, it sufficiently appears that the bodies of these four murderers, after having been given up to the Khojá community of Bombay, were treated with undue funeral honours with the connivance, if not by the direction, of Agá Khán—a circumstance which shows the demoralising effects of religious zeal, and reflects the deepest discredit on the first defendant.

In A.D. 1850 the information and bill was filed, of which the present information and bill purports to be the continuation, and in A.D. 1851 Sir Erskine Perry pronounced the Declaration of Rights, to which reference has already been made.

This had the effect of producing a state of peace in the community, which lasted unbroken for upwards of ten years. The outcasted were re-admitted to caste; the new *Jamát Kháná* of the seceders was abandoned, and all went smoothly until, on the 20th October 1861, Agá Khán thought fit to publish the paper, a translation of which is printed in Schedule B to his answer, and is also filed as Exhibit No. 19.

In this paper Agá Khán expresses his desire to bring the Khojás to conform to the practices “of the Imámujáh creed of his holy ancestors” (in other words, of the creed of the Shiá-Imámi Ismáíli) in respect of “marriages, ablutions, and funeral ceremonies.” He states that, having seen it in print that the Khojás are Sunis, and that a certain person (meaning himself) is “peremptorily inviting them to embrace the Imámujáh creed,” he has prepared this paper in order that (as under the English Government the exercise of all religions is free) the Khojás who believe in the Shiá-Imámi Ismáíli faith may now act openly according to the practices of that religion, “which their ancestors held secretly,” especially as regards the celebration of marriages, funerals, &c. The paper ends thus:—“Now he who may be willing to obey my orders shall write his name in this book” (the paper is written at the commencement of a book with blank leaves for signatures) “that I may know him.”

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The proximate cause of preparing and publishing this paper, is stated in the paper itself, to have been the appearance, in print, of statements that the Khojás were Sunis, and that Agá Khán was attempting by coercion to make Shiás of them. This alleged reason is likely enough in itself, and is borne out by the evidence of witness No. 18, who says: "In consequence of certain newspaper articles stating that the Khojás are Sunis, the Agá got a writing prepared: he told me" (the witness was *Mukhi* of the Bombay *Jamát*) "he should like to see who of the Khojás were Sunis and who were Shiás; those who were Shiás should come and sign that writing."

Accordingly the paper lay for signature at the house of one of the Agá's sons in the Native Town at Bhendy Bazaar, and was signed by some 1,700 male, but not all adult, Khojás of Bombay, Salsette, and Mahim.

Copies were circulated among the Khojá communities of other parts of India and the East—in Sind, Kattywar, Cutch, Zanzibar, and other places, in all of which, as might be expected from the devoted adherence of all Khojás except a small minority in Bombay, to their Sirkár-Sahib, it, as a rule, received an almost unanimous adhesion. In fact, the only exception disclosed by the evidence was that spoken to in cross-examination by witness No. 25—the refusal to sign the writing by about 20 Khojá families at Mowa, a large cotton-exporting port near Bhaunagar in Kattywar. The alleged reason for their refusal to sign was, that by doing so they might offend those members of the Khojá community of Bombay who adhered to the relators and plaintiffs and with whom they had a large and lucrative business connection. They said: "We are Shiás already; why should we sign this writing?" and they refused to do so, or to give up their long-established practice of marrying before the Suni *Kázi*.

It is not unimportant clearly to bear in mind the precise nature of this writing. It is *not*, as it has been occasionally but incorrectly termed, a profession of Shiá faith. It is a mere declaration or pledge on the part of those Khojás who, in matters of religious opinion, are already Shiás, or rather Shiá Imámi Ismáílis, that they will, from the time of signing it, perform their funeral and marriage ceremonies, not according to the Suni form, as it is admitted they had heretofore done, but according to the Shiá form. It is an engagement that those who have all along been Shiás, or Shiá-Imámi Ismáílis in religious opinion, shall thenceforth be so also in all the departments of religious practice.

Such as it was, however, it was regarded as a fresh declaration of war by the party of the relators and plaintiffs. It led at once to a refusal by that party any longer to pay the customary fees and offerings to the Sirkár-Sahib. It led, further, to the filing of the present information and bill, (filed originally in June 1862 as amended in September 1862), the great object of which, as already intimated, is to obtain from this Court an authoritative declaration, that the Khojá community in its origin was throughout, has been, and still is, Suni, and that no Shiá (*a fortiori* that no Shiá Imámi Ismáíli) is entitled to any share, interest, or voice in the management of the trust or public property belonging to the Khojá community of Bombay.

These proceedings of the relators and plaintiffs and their party led to certain retaliatory proceedings on the other side, which, as they were subsequent in date to the filing of this suit, cannot, as already intimated at the hearing, be regarded as affecting the legal status of the relators and plaintiffs. As, however, they have been deposed to by several witnesses and largely commented on by counsel on both sides; as they are requisite to complete the narrative of the relative position of the contending parties; as, moreover, they furnish the best illustration of the mode in which the process of outcasting is actually carried on in the Khojá community under the superintendence of Agá Khán, it will be desirable not to pass them over without mention.

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On the 16th of August A.D. 1862 a meeting of the whole Khojá *Jamát* of Bombay was solemnly convened in the *Jamát Khána*. This meeting, the relators and plaintiffs and their partizans, though duly summoned thereto, did not attend; neither was Agá Khán there, nor any specially constituted agent of his, though there can be no manner of doubt that all that was done at that meeting, and all that followed, was done in concert with him and by his direction. At this meeting a form of notice was unanimously agreed to, dated August 23 (set out in para. 22 of the answer of the first defendant), by which it was intimated to the party of the relators and plaintiffs, that if they consented to abide by all present and future rules framed by the whole *Jamát* for the guidance and benefit of the community, and to pay all fees and contributions due from them up to that day, then the *Jamát* would receive them with joy as brethren—if not, then, within twenty-one days from the presentation of the notice, they would be turned out of caste.

After the expiration of the twenty-one days, the required conditions not having been complied with, the *Jamát* again solemnly assembled in the *Jamát Khána*. Again none of the party of the relators and plaintiffs, though again duly summoned, were present; nor was Agá Khán there, nor any special agent of his. At this second meeting, by the unanimous vote of all the Khojás in *Jamat* assembled, the relators and plaintiffs and their adherents were solemnly turned out of caste, and have remained outcasted ever since.

In February 1864 a further and final step was taken by turning the officiating Suni Moola out of the old mosque in the Khojá burial-ground, since which worship in the old mosque has been carried on by Shiá Moolas and according to Shiá forms.

Since these transactions the party of the relators and plaintiffs have been in the occupation of a separate *Jamát Khána*, and have opened for themselves a separate masjid.

We now pass to the consideration of the question, as a matter of direct historical fact upon the evidence, as to who Pír Sadrín was, and what was the form of Mahometanism to which he converted the Khojás.

According to the tradition uniformly prevailing among the great bulk of the Khojá community—among all Khojás in short, except that numerically

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small proportion of them who are represented by the relators and plaintiffs—Pir Sadrin came from Khorasan as a Dái or missionary of one of the ancestors of Agá Khán (Sháh Islám Sháh), and converted the first Khojás to the Shiá Imámi Ismáili form of Mahometanism.

On the other hand the relators and plaintiffs maintain that Pir Sadrin was a Suni Mussulman, a native of and resident in Multan, and that he converted the Khojás to the Suni form of Mahometanism.

Two witnesses were called—No. 9 by the relators and plaintiffs, and No. 22 by the defendants—both of whom were Syuds, and both, as they deposed, lineal descendants of Pir Sadrin, who each gave exactly opposite accounts of the religious opinions of that converter of the Khojás. Witness No. 9, whose ancestors had, as he said, lived in Surat for the last 100 years, declared that he himself and all his progenitors including Pir Sadrin, were, and always had been, Sunis. Witness No. 22, whose family had, according to his statement, been for 200 years in Surat, declared with equal confidence and with equal apparent credibility that he, and they, and all his progenitors, including Pir Sadrin, were and always had been Shiás of the Imámi Ismáili persuasion.

The testimony of one of these witnesses may be set off against that of the other, subject only to the remark that the testimony of the Shiá witness No. 22 is in accordance with, while that of witness No. 9 opposes the tradition of the greatly preponderating majority of the Khojá community.

But there are three considerations which lead me to the conclusion that the truth is with the majority.

The first consideration is this: If Pir Sadrin had been, as the relators and plaintiffs allege, "a Suni teacher who converted the first Khojás to Suni Mahometanism," he must have stood forth before the Khojá community as the great object of Khojá veneration, with nothing between him and the Apostle of God. In such case the homage, the devotion, the pilgrimages which have been proved to have been made from the beginning by the Khojás to the Imáms of the Ismáilis, would naturally have been paid to the holy tomb of the great founder and saint who had converted the Khojás to the religion of Islám.

Now nothing of this kind is or ever has been the case. Pir Sadrin lies buried in North-Western India at Ootch, in Bhawulpore; but no pilgrimages are made, no extraordinary devotion is shown to his tomb. Not a single Khojá witness has been produced on either side who has ever made a visit to the tomb of Pir Sadrin; the only witness who gave any information about it at all, was No. 24, a witness for the defendants. He, indeed, on cross-examination said that he had known a few Khojás of Sind who had been to Ootch, and told him that the Pír had a fine *durgá* or tomb there kept up by Syuds, descendants of Pir Sadrin, who were all Shiás: he himself, the witness added, had occasionally paid some trifling dues for keeping the tomb in repair; but it was not common for Khojás to go and visit that tomb—he did not know why.

Now this, in my judgment, is a state of things quite incompatible with the theory that Pír Sadrín, of his own mere motion as an independent founder and originator, had converted the ancestors of the Khojás to the Suni faith of Islám. On the other hand, it is exactly what might reasonably be expected, if the tradition of the great body of the Khojá community be well founded, viz., that Pír Sadrín was a mere Dái, or missionary, of a living, though distant, Imám of the Ismáílis, to whom, as to a living concrete object of respect and worship, he from the first directed the spiritual allegiance and veneration of the new converts.

The second consideration is this: as already shown, it is proved as clearly as any circumstance of the kind is capable of proof among a people where oral tradition supplies the place of written records, that the Khojá community from the beginning made pilgrimages and paid contributions to the hereditary Imáms of the Ismáílis. Now, how is this clearly-established fact to be accounted for? On the supposition that Pír Sadrín was a Dái or missionary of the then Imáms of the Ismáílis, the explanation is clear and simple; but if this be denied, what other explanation is to be given of the facts? Was there a subsequent conversion and a second founder? This is not even pretended, and, if there had been, some tradition of it it would certainly have been preserved, whereas no such tradition exists or is pretended to exist. When one allegation, supported by an exceedingly strong and uniform current of tradition, clearly explains a proved state of facts, which no other suggested hypothesis will account for, it is surely not enough for those who dispute that allegation, simply to set up a counter-allegation, supported by a far weaker current of tradition, which instead of explaining the proved facts, makes them unaccountable. If Pír Sadrín was a Suni, and converted the first Khojás to Sunism, how are we to account for the well-established fact that the Khojás, from the beginning, have been bound by ties of close spiritual allegiance, evidenced by outward acts of homage and devotion, to the hereditary Imáms of the Ismáílis?

The third consideration arises out of the character of the ancient religious books of the Khojás, and especially of the "Dásavatar," the chief of them,

Now, by a tradition long universal in the Khojá community, and never, I believe, called in question by any Khojá, till the appearance, in the witness-box, during the progress of this suit, of two or three of the more zealous witnesses for the relators and plaintiffs, the authorship of the *Dásavatar* is ascribed to Pír Sadrín.

If it be not his, then the same difficulty arises as was suggested under the last head of observation. If the original converter of the Khojás were not the composer, or (which for this purpose amounts to the same thing) the introducer to the sect, as a leading book of religious teaching, of the *Dásavatar*, how comes it that that book has been from the beginning the accepted scripture, so to speak, of the Khojá sect?

That it has been so, and, with the exception of the party of the relators and plaintiffs, still is so, is abundantly clear on the evidence. The present information and bill (in its first paragraph), adopting as true the statement

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to that effect continued in the information and bill of 1850, alleges "that the *Dāsavatar* is invariably read over Khojās who are at the point of death." The evidence taken in this case proves incontestibly that in all the *Jamāt Khānds* of the Khojās throughout India and the East, "including that of Bombay, the *Dāsavatar*" is publicly and periodically read as a matter of stated religious observance.

If Pīr Sadrīn, according to the vastly preponderating tradition in the community, composed this work, or if he introduced it as a work of principal religious authority to the first Khojā converts, the explanation of its continuous and all but universal use in and by the Khojā community is easy and plain. On any other supposition it remains inexplicable, unless, indeed, the relators and plaintiffs had come prepared with proof, not a shadow of which have they even attempted to give as to when, how, and by whose instrumentality, if not that of Pīr Sadrīn, this book became adopted by the Khojās as the most sacred volume of their religious literature.

It is impossible to evade the force of these considerations; it is impossible not to see that the evidence on this point leads, as the only reasonable inference, to the conclusion that the *Dāsavatar*, if not composed by Pīr Sadrīn, which is the more probable supposition, was, at all events, introduced by him as a leading religious tract or text-book for the use of the first converts among the Khojās.

Regarding, then, Pīr Sadrīn as the author, compiler, or adapter of the *Dāsavatar*, what is the inference that arises from the nature of that work as to the nature of his religious opinions?

What is the *Dāsavatar*? It is a treatise in 10 chapters containing (as, indeed, its name imports) the account of ten avatars or incarnations each dealt with in a separate chapter. The first 9 of these chapters treat of the nine incarnations of the Hindu god Vishnu; the 10th chapter treats of the incarnation of the "Most Holy Ali."

The negative conclusion is clear at once. No Sani could have composed, compiled, or adapted such a work as this; the idolatry of the first 9 chapters, the semi-deification of Ali implied in the 10th chapter, alike are utterly impossible.

On the other hand it is precisely such a book as a Dāi or missionary of the Ismāīlīs would compose or adapt if he wished to convert a body of not very learned Hindus to the Ismāīlī faith. It precisely carries out, what it has already been shown, were the standing instructions to the Dāis of the Ismāīlīs, viz., to procure conversions by assuming, as in great part true, the religious stand-point of the intended convertite. This is exactly what this book does: it assumes the nine incarnations of Vishnu to be true as far as they go, but not the whole truth, and then supplements the imperfect Vishnuvite system by superadding the cardinal doctrine of the Ismāīlīs, the incarnation and coming manifestation (or Avatar) of the "Most Holy Ali." When the book is read in the *Jamāt Khānā* of the Khojās, it is this 10th chapter (as appears from the evidence) which is alone now-a-days seriously attended to,

When that chapter is commenced, the congregation of the people rises and remains standing till it is concluded, making profound reverences whenever the reader pronounces the name of the 'Most Holy Ali' (*Mowla or Motizir Ali*).

The above considerations leave me in no doubt as to the only reasonable conclusion to be drawn from the evidence on the point immediately under discussion; that conclusion is, that the preponderating tradition of the Khojā community is substantially correct, that Pir Sadrdin was a Dāi or missionary of the hereditary Imāms of the Ismāīlis (probably of Shāh Islām Shāh), and that he converted the first Khojās to the Shiā Imāmi Ismāīli form of Mahometanism (r).

But, then, it is said, if this be so, how is it to be accounted for that, from the beginning, the Khojās in their *funerals and in their marriages have followed the practices and the rites of the Suni Mahometans?*

The fact that they have done so, is not seriously contested by the defendants, and has been most conclusively established by the evidence adduced on behalf of the relators and plaintiffs.

The answer given to the above question by the defendants is, that the Khojās have observed these practices from the beginning out of "*Takiah*"—concealment of their own religious views and adoption of alien religious ceremonies out of dread of persecution for religion's sake.

It has already been shown that "*Takiah*," in this sense, has been uniformly recommended by the teachings and illustrated by the practice of the Shiā Imāmi Ismāīlis.

The doctrine and practice of "*Takiah*" is unknown to the Sunis: as the orthodox and dominant body in Islām they never had occasion for it; but it is frequently practised, as already seen, by the Shiās, and it is still more deeply ingrained into the habits of the Ismāīlis who, of all other sects, have been most obnoxious to the persecution of the fierce and orthodox Sunis.

What the fierceness of Suni bigotry amounts to, is a matter difficult to convey adequately by any general terms—it will be better judged of by a single well-attested illustration.

The great Emperor Akbar ruled over India from A.D. 1546 to A.D. 1605: as is well known, he was an ardent religious reformer, who attempted, if he did not complete, the establishment of an eclectic system that approached pretty nearly to pure theism (s).

He was also a great patron of literature, especially Hindu literature, the principal works of which he caused to be translated from Sanscrit into Persian. Among those employed by the Emperor in these labours was the very learned Suni Moola—Abdul Kadir—whose task it was, very much

(r) Sir Erskine Perry, as appears by a note to his reported judgment in the case of Khojā inheritance, had, on further reflection, arrived at the same conclusion. See note to p. 113 of *Perry's Oriental Cases*.

(s) Elphinstone's Hist. of India, Book IX, Chap. 3; Akbar Shāh's Divine Monotheism, by E. Rehatsek, Edn. of 1866, Bombay.

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against the grain, to translate for his Imperial patron considerable portions of the Rámáyana, the great epic of "those accursed pagans and idolaters," as the learned Suni called his Hindu fellow-subjects.

Abdul Kadir has left behind him a species of diary called the "Muntakab-al-Tawarikh," which presents a lively picture of the court and of the religious projects of Akbar. This diary is often referred to by Mountstuart Elphinstone in his admirable 'History of India under the Mahometans,' and has lately been in part rendered into English by Mr. Edward Rehatsek, who has now collected into a small volume (*Bombay Union Press, 1866*) a series of translations from it which had previously appeared in the columns of *Native Opinion*, a very able periodical conducted by Native gentlemen who have received and illustrate the advantages of an English education. From the diary so translated I take, with omissions, the following notice, by Abdul Kadir, of the assassination and of what followed the assassination of Moola Ahmad, a celebrated Moola among the Shiás, who by favouring the Emperor's views of religious reform, had drawn down upon himself the especial wrath of the Sunis. "In this year (A.D. 1587) Mirza Fullad Beg Birllas decoyed Moola Ahmad, the heretic—who had publicly cursed the companions of the Prophet" (i.e. the three first caliphs)—"out of the house and killed him, and the words '*Hurrah for the dirk of steel*' as well as the words '*The swine of Hell*' embody the date (t). Verily when that hound was in his last agony, I beheld his countenance like that of a hog, and others have likewise seen it in the same form." For this crime the assassin was executed, or, as Abdul Kadir expresses it, "attained the rank of martyrdom" in the city of Lahore. He then proceeds thus:—"The murdered man survived his murderer only three or four days. After he was buried, Sheikh Fayzdy and Sheikh Abulfadzl appointed watchmen over his grave; but, as the court went that year to Cashmere, the inhabitants of Lahore disinterred one night his stinking carcase and burnt it." (*Page 79 of Mr. Rehatsek's Translation.*) In the above passage breathes the full spirit of the Suni bigot—the Pharisee of Islám—narrow, and formal, and fierce. If such things could happen under the reign of the great and powerful Akbar, to a Shiá who enjoyed his close personal friendship, it may easily be understood what would in all probability have been the lot of the earlier Khojás if they had openly professed the hated faith of the Ismáílis, and had not resorted to the Suni Kázis for the celebration of their marriages and to the Suni mosques and Moolas for the performance of their funerals.

To do so, indeed, was a matter of convenience, almost of necessity, as well as of *Takiah*. Even now, in wealthy and prosperous Bombay, Shiá Moolas, as it appears on the evidence, are not to be found without some difficulty. How were the Khojás, dispersed in remote and rural districts, and who, as the evidence in this case shows, had never any musjids of their own—how were they to get funeral ceremonies performed at all, unless they employed the sole

(t) It is a favourite exercise of Persian ingenuity, in recording any event, to compose a motto in verse, which, while expressing some sentiment appropriate to the event, also records its date.

agency they could find at hand—that of the Suni Moolas officiating in the Suni mosques? As regards marriages, the principle of convenience was still more strongly in favour of celebrating them before the Suni *Kázis*, who keep a regular and careful register, capable of supplying easy and authoritative proof of the fact of marriage—a fact which it is so often of great importance to have the means of establishing by legal proof. Add to this, the class of motives which in England, even since the passing of what is called the Dissenter's Marriage Act (6 and 7 Will. IV. c. 85.) which came into force on 1st March 1837, still induce so large a proportion of the dissenting body to marry according to the rites and ceremonies of the Church of England. From the last *Annual Report of the Registrar General of Births, Deaths, and Marriages in England for the year 1864 presented to Parliament in 1866*, it appears that out of the whole number of marriages celebrated in places of public worship in England, the proportion of marriages in churches to those in Dissenting chapels is 9 to 1. After making due allowance for the marriages which take place, without any religious ceremony, in the offices of the Superintendent Registrar, this proportion is so greatly in excess of that borne by the Church of England to the Dissenting population, that it shows, as the Registrar General observes, that large numbers of Dissenters willingly accept the church ritual in the performance of their marriage ceremonies.

Of course, it would be preposterous to infer from this that the Dissenters so marrying conform in other respects to the doctrine and discipline of the Church of England—the fact being notoriously the reverse. It only shows that, partly from the influence of long-prevailing practice, partly from notions of fashion and respectability, great numbers of Dissenters prefer being married by the regular functionary and in the orthodox form,—by a clergyman of the establishment in the parish church.

Motives of this class operate quite as strongly in the East as in the West; and it will be the strongest possible proof of the influence of the *Agá* over the *Khojá* community, if he ultimately succeeds in inducing them to abandon the long-established and convenient practice of celebrating their marriages before the Suni *Kázis*.

As to the argument that, though “*Takiah*” might account for such compliance with Suni practices in times of persecution, yet it could not account for their continuance after the dread of persecution had disappeared—this reasoning can have no force with those who consider the all but omnipotent power of use and wont in the ordinary usages of social life, and who reflect on the long continuance of practices and institutions (and that not only in the East) long after the reason of their first establishment and all sufficient grounds for their perpetuation have passed away.

It appears to me that, in the presence of such considerations as these, the established fact of the performance by the *Khojás*, from the beginning, of their funeral and marriage rites after the fashion of the Sunis, has no appreciable bearing on the question as to what, from the beginning, were their religious opinions and tenets.

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It is much the same with the inference endeavoured to be drawn from the erection and maintenance, since A.D. 1822, of the Suni mosque in the old Khojá burial-ground of Bombay. That this mosque was dedicated as a Suni mosque (though without the usual Suni dedicatory inscription containing the names of the first three caliphs) and that it was used and attended by a certain limited portion of the Khojá community of Bombay, for the celebration of worship in Suni form—is quite clear upon the evidence. But this does not touch the question, even of the religious belief of the bulk of the Khojá population of Bombay from 1822 to 1864, far less the sole question with which this enquiry is really concerned, viz., the religious belief of the Khojás in their origin as a distinct community.

This mosque was built in the old Khojá burial-ground, and by the great majority of the Khoja community of Bombay it was only used, as the evidence clearly shows, for *funeral* purposes. The small minority—the party of the relators and plaintiffs—the wealthy Khojás of Bombay who for a couple of generations or so have adopted the respectable and orthodox faith of the Sunis—they, indeed, habitually frequented this mosque for the purposes of religious worship. But the mass of the Khojá community of Bombay still continued, as of old, to worship in their *Jamát Khánd*, where, as the evidence shows, they prayed in Shiá fashion with their arms to their sides, bowed their heads in prayer on moulds made of the dust of Kerbela, occasionally partook of water mixed with that sacred earth, and three times a day recited, in the Dowá, the long bead-roll of the ancestors of their 'Murshed,' Agá Khán, the hereditary chief of the Ismáílís.

As, for funeral purposes, the whole community used this mosque and also the services of the officiating Suni Moola, it was but natural and reasonable that that functionary should be paid (as in fact he was paid) by the *Mukhi* and *Kamaria* on account of the *Jamát*; but from such a payment as this it would be preposterous, in the face of such facts as have been established by evidence in this case, to infer that the Suni form of Mahometanism was or ever had been the religion of the Khojá community of Bombay.

From the above circumstances, then, (i.e. performance of funerals and marriages in Suni fashion), and the existence for 42 years in Bombay of a Suni mosque attended by a part of the Bombay Khojás, no clear inference can be drawn as to the original religious opinions of the Khojá community. *There are, however, other practices of a religious nature, from the observance or non-observance of which by the Khojás the inference as to their religious opinion is almost irresistibly strong.*

Take the Hadj, or pilgrimage to Mecca, for instance. If there be one religious duty which more than any other is regarded as imperative on all Sunis having the means and ability to fulfil it, it is the Hadj or pilgrimage to Mecca. Once, at least, in his life every Suni who can afford to do so is bound by every principle of religious duty to visit the spot, which to Sunis is the most sacred in the whole habitable globe. That the Sunis of India are not less zealous than those of other parts of the East in the performance of this duty, is clearly proved by the vast stream of pilgrims which, except

during the prevalence of the south-western monsoon, makes its way from all the large ports of India across the Arabian Sea to Jeddah, and thence to Mecca.

Now, what is the case with the Khojas? Why, the evidence is, that not more than eight or ten Khojás in all can be named who from any part of India and the East have ever made the Hadj or pilgrimage to Mecca; and yet these same people, according to the same evidence, go in hundreds, nay in thousands, to Kerbela, a pilgrimage quite as difficult, costly, and dangerous as that to Mecca, and which, though regarded by Shiás as a pious duty, is regarded by Sunis as a superstitious act of folly, even if it be not a positively prohibited and unlawful practice.

And, then, what is to be said of the prayers performed three times a day (not five times) in all the *Jamát Kháuds* of the Khojás, and with arms held down to the sides, not crossed on the breast; of the prostrations on moulds made of the dust of Kerbela, the solemn drinking, at stated anniversaries, of water mixed with the dust of Kerbela; of the refusal to mingle in the Suni mummeries of the Mohurram, the mourning at home or in their *Jamát Kháuds* over the memory of Hoossein, the "Shehad" or martyr—the martyr done to death by those whom the Sunis venerate as the lawful caliphs or successors of the Apostle of God?

The people who do these things—the people who omit to perform the Hadj but who crowd to Kerbela—the people who are zealous for the performance of all the most distinctive religious practices of the Shiás,—these people are not and cannot be Sunis; they may be either Shiás, or Shiá Imámi Ismáilis; and the evidence in this case clearly shows they are the latter.

One final proof may be adduced on this point, and that is the practice of making pilgrimages to Durkhána—a practice which, as has already been shown, was habitual with the Khojás from the beginning. Until Agá Khán left that country in 1839-40, these pilgrimages were always made to some place or other in Persia, the country in which, from the fall of Alamut till the flight of Agá Khán, the hereditary chiefs of the Ismáilis have throughout, as a rule, resided. Now, if there be one thing more than another which a Suni religiously avoids, it is the setting his foot, without compulsion, on the heretical soil of Persia. A striking illustration of this is to be found in a work which I have always regarded as one of the most instructive and entertaining in the whole range of Oriental Literature—"the Autobiography of the Emperor Baber," the celebrated conqueror and founder of the Mogul dynasty (1 vol. 4to., London, 1826) translated partly, by Dr. Leyden, but principally by Mr. William Erskine, the latter the son-in-law of Sir James Mackintosh and the father of the present accomplished member of the Bombay Council, the Honourable Claudius Erskine. In a note to the 244th page of that most interesting work Mr. Erskine writes as follows:—"An Usbek Moola (from Bokhara) whom I consulted" (in Bombay) "had just made the pilgrimage to Mecca. On my enquiring if he had passed through Persia, he expressed great horror. I found that, to avoid touching the soil of Persia, he had gone from Bokhara to Khokan, thence to Cashgar, thence

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to Astrakhan, thence by the Crimea to Constantinople. He then went by sea to Alexandria, and joined the caravan of Cairo. I saw him in Bombay whither he had come from Jeddah after making the Hadj. He was then preparing to return home by Delhi, Lahore, and Peshawur in order to avoid coming into contact with the Persian Shiás."

And yet the Court is asked to believe that a community which was from the beginning in the habit of making pilgrimages to various parts of Persia was also from the beginning Suni, and this, too, though the object of those pilgrimages was to pay devout homage to the hereditary Imám of the Ismáilis, a personage whom all orthodox Sunis regard as a very chief and prince of heretics.

It is unnecessary to add anything more. The clear conclusion at which I have arrived upon a full consideration of the evidence before me is this—that the Khojás never were Sunis, but that from the beginning they have been and (with the exception of the relators and plaintiffs and their followers in Bombay) still are Shiás of the Imámi Ismáili persuasion.

And this in effect disposes of the whole case against the relators and plaintiffs. Fully conceding to Mr. Scoble the authority of the cases and dicta he cited on this point, it appears to me that they are not applicable to the present case. This is not a case in which the plaintiff has mistaken his remedy, but one in which he has failed in his proof. The relators and plaintiffs in this case are quite right in the stand-point they have assumed, viz., that the Khojá sect is a community held together and distinguished by certain religious opinions. Where they have failed, is in proving that these religious opinions are those of the Suni Mahometans. The Court is now in a position to give an adequate description of the Khojá sect; it is a sect of people whose ancestors were Hindus in origin, which was converted to and has throughout abided in the faith of the Shiá Imámi Ismáilis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imáms of the Ismáilis.

In order to enjoy the full privileges of membership in the Khojá community, all the terms of the above description must be complied with; a person, more especially who is not a Shiá of the Imámi Ismáili persuasion, is, to use, with a reversed application, the language of the 5th paragraph of the prayer, "not entitled unto, nor ought he to have any share or interest" in the public property of the Khojá community "or any voice in the management thereof."

Mr. Anstey was quite right when he said "*If the Khojás are Sunis, we (the relators and plaintiffs) succeed; if they are not Sunis, we fail.*"

In fact, there is no ground left upon the evidence on which the relators and plaintiffs can seek relief from this Court, either in its charitable or any other jurisdiction.

Looking, for instance, at the Khojá community of Bombay in an educational point of view, no case for the interference of the Court has been made out.

No deed, writing, or scrap of paper of any kind was produced showing any gifts of property to the Khojá *Jamát* of Bombay with an ulterior destination to be applied in the establishment or maintenance of schools for the public use and benefit of the whole community.

But was there any proof of an implied trust of this kind—any proof of the existence, in fact, at any time of any school maintained out of the public monies of the community for the general educational purpose of the community?

No proof of this kind was offered; there was, indeed, and there still is, a school held in a building adjoining the *Jamát Khānā*, and open, apparently, to all children of the Khojá community; but the evidence is that this school was originally established, and has been throughout maintained, by the private munificence of Mr. Kāssambhāi Nathubhāi and three or four other wealthy Khojās of the party of the relators and plaintiffs. Moreover, as to this school, it was clearly and positively stated by witness No. 1 that the relators and plaintiffs had no complaint whatever to make.

Then look at the Khojá community of Bombay as an *eleemosynary* institution, and the result is the same. Here, again, there is no proof whatever of there ever having been any express gifts in trust for the poor of the community; but there is proof that the poor of the community have, in fact, long enjoyed a certain amount of maintenance and support at the public expense. They have been allowed free quarters on the ground-floor of the *Jamát Khānā* and some other public buildings belonging to the *Jamát*; they frequently receive relief in the form of food and clothing; and they are buried in the Khojá burial-ground at the public expense.

But the evidence is clear and decisive that, whatever benefit in the way of alms and maintenance the poor of the Khojá community have ever enjoyed, they enjoy still in as ample a measure as at any former time; and there has been no kind of proof that these benefits have been in the slightest degree interfered with by any act or omission of the first defendant or his adherents.

It remains, then, only to consider the prayer for an injunction. This, again, is to a great extent, if not entirely, disposed of by the conclusions already drawn from the evidence in this case.

In so far, for instance, as it seeks to restrain the first defendant from interfering with the election of *Mukhi* and *Kamaria*, the evidence clearly shows that it is, and throughout has been, the custom in all the Khojá *Jamāts* to consult the "Murshed" or his agents before appointing either of these important functionaries. Considering the relation, now fully ascertained by the evidence, in which the hereditary head of the *Ismāīlis*, the *Sirkār-Sāheb*, has always stood to the Khojá community, and considering that the *Mukhi* and *Kamaria* (as the evidence also shows) are the officers specially charged with collecting and administering the monies raised on the *Sirkār-Sāheb's* account, I can see no ground whatever for an injunction

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in the circumstances—(and nothing more is proved) that these officers are not, as a rule, appointed without consulting either the Murshed, or, in his absence, his lawfully constituted agents.

As to that part of the prayer for an injunction which asks the Court to intervene between the Khojás who on the one side are ready to make, and the Agá who on the other side is willing to receive, voluntary offerings and customary contributions, it will not bear, and does not require any serious discussion.

As we have already seen, the great body of the Khojás, unless they thought they were making payments to and for the benefit, primarily, of their Sirkár-Sáheb, would not contribute a single pie towards the public expenses of the community. To interfere, therefore, in the way desired, would be simply, even if such an interference could be carried out, to reduce the Khojá community, as a public community, to insolvency. But, virtually, it could not be carried out, and this Court has too much respect for itself to issue an order of this kind, which would be a mere *brutum fulmen*, liable to almost infinite modes of evasion, and only enforceable, if at all, by issuing attachments against more than two-thirds of the whole Khojá community of Bombay.

If Government, indeed, should be of opinion, that the receipt of some £10,000 a year by Agá Khán, while continuing to reside in Bombay, from the Khojá communities dispersed through India and the East, is, as suggested by the learned leading counsel for the relators and plaintiffs, on political grounds objectionable, they have the remedy in their own hands. But till they have applied such remedy (and I venture to think it extremely doubtful if they ever will), either by removing Agá Khán from Bombay, or prohibiting such payments being made to him while he remains here, I can see no ground on which the making of such payments on the one side, or demanding them on the other, can be made the subject of an injunction by this Court.

The only point remaining, relates to the subject of out-casting or excommunication. Now, the evidence shows that this extreme and ultimate mode of punishing a violation of the conditions of caste-membership, although, doubtless, never, in fact, resorted to except with the concurrence and by the direction of the Spiritual Head or Murshed of the Khojás, is, in form, the act of the whole Khojá community in *Jamát* assembled. Allárukhiá Sumár, the *Mukhi* of the Bombay *Jamát*, was much pressed in cross-examination as to the point, whether, if the *Jamát* considered a direction by the Agá to turn any Khojá out of caste unjust or ungrounded, they would refuse to comply with such direction. The witness had considerable difficulty in contemplating the possibility of such a case (as much difficulty as a strong Ultramontane Romanist might have in conceiving that the Pope could possibly go wrong in any matter relating to the government of the Church); but when, at length, he had been brought to entertain the hypothesis, his answer was that, in such case, the *Jamát* would first protest, and, if that proved vain, would finally refuse to comply with a direction to out-caste which they felt to be unjust.

No doubt in several passages of his answer the first defendant pitches his claims pretty high. Spiritual heads of communities are not generally remarkable for the modesty with which they state their pretensions. But in the 30th paragraph of his answer he sets forth his claim in accordance with the mode in which excommunication appears upon the evidence to have been uniformly carried out in the Khojá community. In that paragraph, after stating that "he claims to be and is the Spiritual Head of the Khojas," he goes on to say "that all Khojás resisting my doctrines" (i.e., the doctrines of the Shiá Imámi Ismáili faith) are liable to be expelled "at my request by the *Jamát* from the Khojá caste."

It is quite clear that in every community having to a certain extent a religious character—and such the evidence shows to be the case with the Khojá community—there must be vested an ultimate power, in cases of obstinate refusal to comply with the defined conditions of communion, to deprive recusants of the privileges of communion,—in other words, to excommunicate them; nor do I see how such a power can be more properly exercised than by the act of the whole community on the suggestion and by the direction of its Spiritual Head. That Agá Khán is the Spiritual Head of the Khojás has, in my judgment, been clearly made out by the evidence; and to say that, as such, he is not to have a potential voice in determining who, on religious grounds, shall or shall not remain members of the Khojá community, appears to me entirely unreasonable.

In fact, in every community, whether of a religious nature or not—whether Church or Chapel, Caste or Club—there must, as requisite for the preservation of a community, and as inherent in the very conception of a community, necessarily exist a power—not, indeed, to be exerted except in extreme cases and on justifying grounds—of depriving of the privileges of membership those who persistently refuse, after due notice and warning, to comply with those ascertained conditions of membership to which, by the very fact of being members of the community, they must be held to have given an implied, if not an express, consent.

As it does not appear to me on the evidence that any other or greater stretch of power than this has ever been exerted by the Khojá community under the direction of its Spiritual Head, I must decline to grant the injunction on this ground; nor is there any ground whatever on which the injunction, as prayed, ought, in my judgment, to be allowed.

Upon the whole case, therefore, the decree which the Court must pronounce is quite clear. It is—

That this suit be dismissed as against the first defendant His Highness Agá Khán, as against Allárukhiá Sumár and his co-answering defendants, as against Asso Gángji, with costs as to all the said defendants to be paid by the relators and the plaintiffs.

As against the other defendants on the record, not in the same interest as the defendants above named, the decree is that the suit be dismissed, but without costs.

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[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 51 of 1873.*1875.
December 28.

LAKSHMA PPA' (original Plaintiff) Appellant.

RA'MA'VA' and others { (original Defendants)
Respondents.

Hindu Law—Adoption of the eldest or only son—Gift in adoption by widow—Assent of husband when implied—Adoption among Brahmans and Sudras—Disqualification for adoption—Marriage—Chūdakarana and Upanayan ceremonies—A *dyōyamushyayana* son.

In Western India an adoption among Sudras is not invalid, although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and, therefore, not a *sagotra* (i.e., of the same family) with the adopter.

Even among Brahmans marriage does not disqualify for adoption.

Quære—Whether the adoption of an *asagotra* married man belonging to any of the three regenerate classes would be invalid.

According to Hindu law, a second adoption is invalid while the first adopted son exists and retains his character of a son.

Among Brahmans the adoption of a son for whom the *chūdakarana* and *upanayana* ceremonies have been performed in his natural family is not on that ground invalid. He notwithstanding acquires the legal status of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, their re-performance and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family.

A gift, by a Hindu widow, of her deceased husband's only son is invalid in the absence of an express authority conferred upon her by him during his life-time. Such an adoption, being null and void *ab initio*, cannot be supported by the maxim *quod fieri non debuit factum valet*.

Quære—Whether a gift in adoption of an only son by his father is void in the Presidency of Bombay.

In the Presidency of Bombay a widow may give in adoption a younger son where her husband has not, by direct prohibition or otherwise, indicated his unwillingness that she should, after his death, give such younger son in adoption, the husband's assent to such a gift being implied. But it cannot be implied to the gift, by his widow after his death, of an eldest and still less of an only son in adoption where he did not expressly indicate such assent in his life-time.

Semble. Where a father gives his only son in adoption as a *dyōyamushyayana* he consents to deprive himself of one-half of the spiritual benefit derivable

from the performance of religious obsequies. Hence his consent cannot be implied even to such a gift when made by his widow after his death. To such a case the *factum-valet* principle is wholly inapplicable, because the adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*.

The maxim *quod fieri non debuit factum valet* considered, and its application pointed out.

There can be no gift where there is an absence of authority, the attempt to give being a mere nullity. There is nothing in such an attempted transaction to set aside; it should simply be declared null and void *ab initio*.

There is no authority for drawing any distinction between Sudras and the other classes on the question of the legality of the adoption of an eldest or an only son,

Mhalsabai v. Vithoba (1) dissented from so far as it supported the gift in adoption, by a widow, of an only son without the authority of her husband.

THIS was an appeal from the decision of Dayaram Mayaram, Subordinate Judge (First Class) of Belgaum, in Original Suit No. 336 of 1871.

Lakshmappá, a Sudra by caste, brought this suit in the Subordinate Judge's Court at Belgaum against Rámává (widow of Sitáramáppá) and others, seeking to recover certain moveable and immoveable property, and to establish his right to certain annual payments from Government attached to a Náiki *vatan*. He alleged that he was the adopted son of Sitáramáppá Náik, deceased, and, as such, entitled to the possession of the said property and enjoyment of the said money allowances. He further alleged that he had been given in adoption by his natural mother Bhágirthibái, after her husband's death, to Rámává, Sitáramáppá's widow.

Rámává answered that neither she nor her late husband Sitáramáppá had legally adopted the plaintiff as a son; that he was unfit for adoption according to Hindu law, as he was the only son of his parents; that she had only brought him up as foster son, because both his parents were dead, and because he agreed to act according to her wishes and allow her to enjoy the property during her life-time.

Defendants 2 and 3 (Somáppá and Rámáppá) denied that the plaintiff had been adopted as alleged, and pleaded, among

(1) 7 Bom. H. C. Rep., Appx., p. xxvi.

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other things, that, even supposing he had been adopted, the adoption was invalid according to Hindu law. Rámáppá, (defendant No. 3) further pleaded that he himself had been adopted by Rámává (defendant No. 1) before the plaintiff's alleged adoption by her, and that, therefore, the latter adoption was invalid.

On the 24th March 1873 the Subordinate Judge disposed of the case on only one issue, viz., whether the plaintiff's adoption was invalid by Hindu law by reason of his having been married before his adoption. He found this issue in the affirmative, and dismissed the plaintiff's suit. He was of opinion that his decision was supported by *Nátháji Krishnáji v. Hari Jagoji*.⁽¹⁾ He observed in his judgment: "The precedent quoted above clears this question entirely. I referred to the authorities of the Hindu law stated therein, and find that the adoption of a Sudra (not a *sagotra*) is invalid if taken place after his marriage. It is in evidence that the plaintiff is the son of the deceased Sitárámáppá Náik's sister, and, consequently, he is not a *sagotra* (of the same family), and it is also in evidence, as well as admitted by plaintiff's pleader, that plaintiff's adoption took place long after his marriage. * * * and after his marriage he became an object incapable of adoption under the Hindu law. The objection, in my opinion, is fatal to the plaintiff's case, and the precedent cited by the defendant's pleader is the converse of this case; the person adopted in that case was a *sagotra*, and, therefore, the adoption has been upheld. I see no necessity for going into the other issues laid down formerly."

In appeal, which was preferred by the plaintiff, the only question raised and argued was whether the adoption was valid or invalid. The appeal was heard by Westropp, C.J., and Nánábhái Haridás, J,

Shántarám Náráyán for the appellant:—The lower Court has based its decision on *Nátháji Krishnáji v. Hari Jagoji*,⁽²⁾

(1) 8 Bom. H. C. Rep., A.C.J., 67.

(2) 8 Bom. H. C. Rep., A.C.J., 67.

but that ruling does not apply. The case which is on all fours with the present case is *Mhalsábái v. Vilhobá*,⁽¹⁾ in which the High Court held the adoption to be valid, although the person adopted was, as in this case, the only son of his natural parents, and married before his adoption, and had been given in adoption by his mother after her husband's death and without his authority. The Vyāvahara Mayukha, one of the highest authorities in this Presidency, allows the adoption of "a married man who has even had a son born": ch. iv, sec. 5, pl. 19; Stoke's H. L. Books, p. 64. In *Shri Brijbhukunji Maháraj v. Shri Gokulutsavji Maháraj*⁽²⁾ the late Sadar Adálat held as valid the adoption of a man who was not only married, but had a family at the time of adoption.

Dhirájlál Mathurádás for the respondent:—In *P. Venkatesaiya v. M. Venkata Charlu*⁽³⁾ the High Court of Madras held that the adoption of one upon whom the *upanayana* ceremony has been already performed is invalid. See, also, Cowell's Lectures on Hindu Law, pp. 327—334; 1 Norton's L. C., pp. 65—76. Marriage is among the Sudras what *upadāyana* is among the three superior classes of Hindus. A man of the Sudra Caste, therefore, cannot be adopted after his marriage. The ceremony of *upanayana*, if performed in the natural family of the person to be adopted, may be annulled by the performance of certain other ceremonies. But it is not so with marriage, which is incapable of annulment: 1 Strange's H. L., pp. 90—92; 1 Norton's L. C., p. 76; 2 Strange's H. Law, p. 87. Marriage is the only ceremony allowed for Sudras as calculated to regenerate them, similarly to what tonsure and investiture are for the three superior classes: 1 Strange H. L., p. 335; Datt. Mim., sec. iv, pl. 51, 52, 57; Stoke's H. L. Books, pp. 582—3; Datt. Chan., sec. 2, pl. 29, 32; Stoke's H. L. Books, pp. 643—4; 2 Col. Dig., note to text CXXI (Mad. ed.) The adopted son is supposed to be born again in the adoptive family: 1 Strange's H. Law, p. 90; Macnaghten's Prin. H. Law, pp. 74, 75.

(1) 7 Bom. H. C. Rep., Appx., p. xxvi.

(2) 1 Borr. 181 (1st ed.); 202 (2nd ed.)

(3) 3 Mad. H. C. Rep. 28.

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The following are the judgments of the Court :—

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NA'NA'BHA'I HARIDA'S, J. :—The appellant Lakshmáppá instituted this suit to recover possession of two villages and some lands and houses, as also their title-deeds and a silver seal ; also to recover Rs. 1,000 alleged to have been received as the net produce of the immoveable property, on his account, during three years by the first defendant ; and to establish his right to certain *haks* or money allowances attached to a *vatan*. He averred in his plaint that he was the adopted son of the deceased *vatan*dár Sitárámáppá ; that during his minority the first defendant managed the affairs of the *vatan* ; and that, when he (the plaintiff) came of age two years ago, the defendant, on being asked to make over the property to him, refused to do so on the 1st October 1868.

The first defendant Rámává, the widow of Sitárámáppá, alleged in her written statement, in answer to the claim, that, the plaintiff having consented to act under her orders and allow her during her life-time to enjoy the property, she had kept him as her son ; that he had executed to her an agreement to that effect ; that she had possession of the property ; that he had not been formally adopted as a son either by herself or by her deceased husband ; that he was incompetent to be adopted, having lost both his parents and being their only son ; and that he had filed the suit at the instigation of her enemies.

The second defendant Somáppá contended that the plaintiff was not the adopted son of Sitárámáppá ; that the third defendant Rámáppá was such ; that the *shástras* did not permit the adoption of the plaintiff ; that he (the second defendant) was an equal co-parcener, no partition having taken place between him and Sitárámáppá ; and that he alone had managed the affairs of the *vatan* since the death of Sitárámáppá.

Rámáppá, the third defendant (*inter alia*) denied that the plaintiff was the adopted son of Sitárámáppá, and alleged that he himself was so.

At the suggestion of the third defendant, Deváppá, his natural father, was also made a party, but he did not appear to contest the claim.

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The Subordinate Judge thought it unnecessary to decide any of the questions thus raised between the parties, because he was of opinion that, even if the *factum* of the plaintiff's alleged adoption were proved, the adoption itself was invalid, it having taken place, as admitted by the plaintiff's pleader, after the plaintiff's marriage, and the plaintiff being Sitáramáppá's sister's son, and, therefore, an *asagotra*, or belonging to a different family; and he, accordingly, dismissed the claim.

One of the questions which we have to decide in this appeal is, whether, assuming that the plaintiff was, in fact, adopted by Sitáramáppá, or by his widow Rámává after his death, the adoption was invalid on account of the plaintiff being married at the time, or on account of his being Sitáramáppá's sister's son, and, therefore, not a *sagotra*. With that question I propose to deal. The other questions will be dealt with by the Chief Justice.

The authority relied upon by the Subordinate Judge, in support of his decision upon the point which I am about to discuss, is the case of *Nátháji Krishnáji v. Hari Jagoji*.⁽¹⁾ He seems to think it "clears this question entirely". We are unable to agree with him in this view. We are quite prepared to regard that case as conclusive on the point of law determined in it, namely, "that in Western India the adoption of a *sagotra* or relation (as the respondent Hari was) is not invalid, because the person adopted was married at the time of the adoption."⁽²⁾ But it cannot be looked upon as going further. The adoptive father and the adopted son happened in that case to be *sagotras*. The question, therefore, which arises in this case, whether the adoption of an *asagotra* is invalid, because the person adopted was a married man at the time of the adoption, did not arise in

(1) 8 Bom. H. C. Rep. A.C.J., 67.

(2) 8 Bom. H. C. Rep. A.C.J., 73.

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that case. It is, therefore, one which the learned Judges who disposed of that case did not intend to decide one way or the other, and they have carefully abstained from expressing any opinion on it. The decision of the Subordinate Judge thus deriving no support from the precedent relied upon, we have to determine, on a consideration of the authorities, whether it was correct.

The parties to this suit are admittedly Sudras, belonging to the so-called servile class, and not to any of the three superior or regenerate classes—a circumstance which requires to be carefully borne in mind in dealing with the authorities cited at the bar in support of the decision appealed against.

It has been contended that, as the *chūdākarana* and the *upanayana* ceremonies of the person to be adopted should be performed in the adoptive family, the adoption must take place at a sufficiently early age; and no doubt there is authority for saying that, if a boy eligible in other respects can be obtained, upon whom these ceremonies have not been performed in his natural family, he is to be preferred for adoption to one upon whom they have been performed. But any such rule is obviously intended for the three superior or regenerate classes, and not for the Sudras, those ceremonies not obtaining among them;⁽¹⁾ and even in the case of a Brāhman boy for whom those ceremonies have been performed in his natural family, his adoption is not on that ground invalid. He notwithstanding acquires the legal *status* of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, the re-performance of those ceremonies, and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family.⁽²⁾ It is argued, however, that the ceremony of marriage is not capable, like them, of being annulled and

(1) Manu II, 26, 63 : *Ib.* X, 4, 126 : 2 Coleb. Dig., p. 295. (Mad. ed.); Jagannatha's note on Text 121 : *Id.* p. 301, Text 134 : 1 Stra. 35, 91; Macnaghten, 57, 58 : Yajñavalkya I, 39.

(2) 1 Stra. H. L. 91.

re-performed in the adoptive family ; that, therefore, the adoption of a married Bráhmaṇ would be invalid, and that as marriage is a *sanskára* ordained for the Sudras as well, and, with regard to them, stands in place of the *upanayana*, the adoption of a married Sudra must be equally invalid. This argument is, no doubt, supported to some extent by authority ;⁽¹⁾ but upon the whole it seems to us more plausible than sound. If marriage, because incapable of annulment, disqualifies a Sudra for adoption, it must equally on that ground disqualify a Bráhmaṇ for that purpose. But we fail to find it mentioned as a disqualifying cause either by Manu, Kulluka Bhāṭṭa, Yajñavalkya, or Vijnaneshvara, or by any of the other authorities of weight in this Presidency. On the contrary, we find the Dharmasindhu,⁽²⁾ the Sanskára Kaustubha⁽³⁾ and the Vyavahára Mayukha distinctly recognizing the adoption of a married man, the latter even going a step beyond the other two, and laying it down that “ a married man, who has even had a son born, may become an adopted son ” ;⁽⁴⁾ and, accordingly, in the case of *Sri Brijbhokunji Maháraj v. Sri Gokoolotsavji Maháraj* ⁽⁵⁾ the adoption of a married Bráhmaṇ of the age of forty-five and having a family was considered a good adoption. The argument, therefore, based upon the assumed invalidity of a married Bráhmaṇ’s adoption falls to the ground. But it is further contended that, though a married Sudra may be adopted, still, if he happens to be, as in this case, an *asagotra* relation of the adopter, the adoption is bad. We are not referred to any Bombay authority in support of such a proposition, nor are we aware of any. On the contrary, Nilakantha, whose authority, especially when not opposed to Vijnaneshvara’s, is supreme in this Presidency, broadly lays it down, as already observed, that “ a married man, who has even had a son born, may become an adopted son. This also,” he says, “ is reasonable, for it is not in opposition (to other maxims). ” He does not

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(1) 1 Stra. H. L. 91 ; 2 *id.* 87. (2) See annexed extract in note, p. 373.

(3) See annexed extract in note, p. 374. (4) Vyav. May., ch. iv, sec. v, 19.

(5) 1 Borr. 181.

(6) Vyav. May., ch. iv, sec. v, 19.

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limit the rule to cases where the 'married man' happens to belong to the same *gotra* as the adoptive father, and we see no reason for so limiting it in this case. The adoption of a sister's son, though prohibited to the three superior classes, is declared to be "the most proper for Sudras".⁽¹⁾ In the absence of any sufficient authority, therefore, we should not be justified in holding that the adoption, which is thus declared to be "the most proper" adoption, was invalid, because the boy adopted happened to be married at the time of his adoption. The only original authority to which our attention has been directed as fixing the time or event in a man's life after which his adoption cannot be made, is a passage from the *Kālikā Purāna*, which is not an authority of high rank upon such a subject. That passage runs thus : "O Lord of the earth, a son, having been initiated under the family name of his father, unto the ceremony of tonsure inclusive, does not become the son of another man [*anyatas*]. The ceremony of tonsure and of investiture being, indeed, performed under his own family name, sons given, and the rest may be considered as issue ; else they are termed slaves : After their fifth year, O King, sons given, and the rest are not sons. [But] having taken a boy five years old, the adopter should first perform the sacrifice for male issue."⁽²⁾ Independently of the fact that the genuineness of this passage has been questioned by Nilakantha,⁽³⁾ and denied by Devanda Bhatta,⁽⁴⁾ and "justly denied" according to Sutherland,⁽⁵⁾ it is enough for us on the present occasion to say, first, that the rule therein laid down does not seem to us to have been intended for Sudras at all, the reason of the rule not applying to them,⁽⁶⁾ nor the ceremonies men-

(1) Vyav. May., ch. iv, sec. v, 11, 36.

(2) Vyav. May., ch. iv, sec. v, 20.

(3) *Ibid.*

(4) Dattaka Chandrika, sec. ii, 25.

(5) Stoke's H. L. B. 666.

(6) The bringing up of the adopted son "in the religious tenets of his adoptive father" is given as the reason of the rule : 1 Borr. 195 (ed. 1825), Answer sixth. The *śāstras* contemplate religious instruction for the regenerate classes only : Manu. iv, 80, 81 ; *ib.* ii, 173, 174.

tioned in it obtaining among them ; and, secondly, that it did not prevent the recognition as valid of the adoption of a married Bráhmaṇ of forty-five in the case of *Sri Brijbhokunji Maháraj v. Sri Gokoolotsavji Maháraj*,⁽¹⁾ nor the enunciation, as already observed, without any qualification, by Nilakantha and his father, of the proposition that a married man with family may be adopted as a son.⁽²⁾ We express no opinion on this occasion as to whether the adoption of an *asagotra* married man of any of the three twice-born classes would be valid or otherwise. That, it seems to us, is still an open question, the adopted son in the Maháraj case in 1 Borr. appearing to have been a *sagotra*, though not a *sapinda*, of the adoptive mother. We are clearly of opinion, however, that the adoption of a married *asagotra*⁽³⁾ Sudra is not invalid by Hindu law as administered in Western India. We must, therefore, reverse the Subordinate Judge's decree, and remand the case for a new trial.

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(1) 1 Borr. 181.

(2) Vyav. May., ch. iv, sec. v, 19.

(3) For ceremonial purposes it would appear that Sudras have no distinguishing *gotras* ; 2 Stra. 89 ; remark by Mr. Ellis, Datt. Mim. sec. ii. 80.

NOTE—

Extract from the *Dharmasindhu*, Book III, 1st half, leaf 13, Bombay
Edition of Samvat 1926.

Who may or may not be adopted.

Amongst Bráhmaṇs the son of a uterine brother, because preferable, is to be taken first.

In his absence any *sagotra-sapinda*, or the son of a half-brother.

In the absence of such, an *asagotra-sapinda*, one produced in the family of the maternal uncle or in that of the father's sister, &c.

In the absence of such, an *asapinda* of the same *gotra*.

In the absence of such, even an *asapinda* of a different *gotra*.

Of the *asagotra-sapindas* the sister's son and the daughter's son are prohibited * * * *. But by a Sudra even a sister's son and a daughter's son are receivable * * * *. The adopter having adopted should perform the ceremonies commencing with the *jātakarma* or those commencing with the *chūdākarana* for the boy adopted. This is the preferable doctrine ; but if a boy for whom they can be so per-

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formed is not procurable, then from amongst the *sagotra-sapindas* one whose *upanayana* ceremony has been performed, or even whose marriage has taken place, may become an adopted son; but in the latter case, only if he has not produced a son.* So it seems to me. If adoption is to be made from amongst *asapinda-sagotras*, only he whose *upanayana* ceremony has been performed is to be taken. This appears also. As to a *bhinna-gotra* (one of a different *gotra*), he whose *upanayana* has not been performed is alone to be received. Some authors, however, say that a *bhinna-gotra* whose *upanayana* has been performed, may also be received.

*Extract from the Sanskara Kaustubha, leaf 45, p. 2, line 5, Bombay
Edition of Shak Year 1783.*

One may be adopted as a son whether the *sanskaras* commencing with tonsure have taken place or not, and whether he has passed his fifth year or not. As to the doctrine 'one whose *sanskaras* have not taken place is alone to be adopted,' and 'who has not completed his fifth year is alone to be adopted,' founded upon the *Káliká Purána* [passages which are here given in full],* that is wrong; because some say the passages are not genuine, as they are not to be found in many copies of the *Káliká Purána*; and others say that, even if they be genuine, the first three shlokas have reference to *asagotra* adoption; that, therefore, the last shloka also must be taken to have reference to the same subject; and that hence the rule does not apply to a *sagotra* adoption; and they lay down that even a married [man] may be adopted. But the truth is, that even in the case of *asagotras* a general prohibition [or non-recognition] of adoption after the *sanskaras* ending with the *upanayana* have been performed is not possible upon the strength of the *Purána* passages, because the authority of the *Vedas* to overrule contrary passages from the *Smritis* [and *Puránas*] is well established by the rule of commentators to determine the relative authority of texts, and the above passages of the *Purána* are in opposition to the *Bahvrícha Bráhmaṇa*. Thus it is indisputable that the expression 'the son given and the rest' includes 'the son made and the rest'. Hence it follows that one on whom the *sanskaras* have been performed in his natural family cannot become a 'self-given' son either. But in the *Bráhmaṇa* it is plainly stated that *Shunahshepa* himself became the son of *Vishvámitra*, and it is not to be supposed his *upanayana* had not been performed in his natural family. [Here follow passages from the *Bráhmaṇa*.]

* They are the same as those given in the *Datt. Mim.*, sec. iv, 22.

WESTROPPE, C.J.:—The parties here being *Bedárs* by caste, and accordingly *Sudras* by class, I concur with my learned brother in holding that, if the only objections to the validity of the plaintiff's (*Lakshmáppá's*) alleged adoption were that he was married previously to the adoption, and that he was

son of the sister of Sitáráráppá, those objections cannot prevail.

But, in addition to those points which he has disposed of, it is, we think, necessary, with reference to the new trial which has been ordered, specially to notice certain questions which must present themselves on that new trial, and which have not been dealt with by the Subordinate Judge on the trial which has already taken place.

We have here two adoptions alleged to have been made by the first defendant Rámává, the widow of Sitáráráppá, in her capacity as his widow. One of these, which is alleged—whether truly or not, we do not pretend to say—to have been the earliest in date, is that of the third defendant Rámáppá. If that adoption were first made, and there were not any circumstances which rendered it invalid, she could not afterwards, so long as Rámáppá lived, adopt the plaintiff or any other person: *Rangámá v. Atchámá*. (1) Again, assuming that Rámává did not adopt Rámáppá, or that such adoption, if made, were not valid, and that she did go through the ceremony of adopting the plaintiff Lakshmáppá, the question will arise whether the adoption of Lakshmáppá was valid. For, even if she did not adopt Rámáppá, or that the adoption of him is invalid, it does not thence necessarily follow that Lakshmáppá, the plaintiff, must succeed in this suit. It must be proved that Lakshmáppá was a person whom she could, according to law, adopt, and that the person, if any, who gave him in adoption, had power so to do. Rámává has in her written statement in defence averred that Lakshmáppá was the only child of his parents. His father, it seems to be admitted on both sides, died many years ago; but the plaintiff alleges that his (the plaintiff's) natural mother, Bhá-girthisáí, after his father's death, gave him in adoption to Rámává as son to Sitáráráppá, her husband. The case made on behalf of the plaintiff is that this gift by his natural mother Bhá-girthisáí took place about five years before the institution of this suit, and that Bhá-girthisáí died about

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(1) 4 Moore Ind. Ap. I.

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one year after she gave him in adoption.' So far as we can judge from the evidence brought to our notice, the case for the plaintiff is that he was given as a *dattaká* in the ordinary manner. It certainly has not been argued or stated that he was given as a *dvyámushyayana*. In support of the plaintiff's case, as above stated, witnesses have been examined, and have given evidence to the effect alleged. But witnesses on behalf of the defence have testified that the plaintiff's natural mother died ten or eleven years before the filing of the plaint, and, therefore, that it was impossible that she could have been any party to the gift in adoption, deposed to as made four or five years ago. If she were dead at the time of the alleged adoption, his natural father being also dead, the alleged adoption of the plaintiff must fail—it not being competent for any other person than the natural father or mother to give in adoption: *The Collector of Surat v. Dhirsingji*,⁽¹⁾ *Báshetiáppá v. Shivlingappa*.⁽²⁾ The son cannot give himself in adoption: *Báshetiáppá v. Shivlingappa*,⁽³⁾ *Subbáluvammal v. Ammalcutty Ammal*.⁽⁴⁾ To the same effect is the answer of the *shástri* of Thána, given on the 6th of March 1858, MS.

Again, assuming the natural mother, Bhágirthibái, to have been living and to have gone through the ceremony of giving the plaintiff in adoption in the ordinary manner, there remain the questions—(1) Was the plaintiff an only son? (2) If he were so, had she any capacity to give him in adoption without an explicit authority to do so conferred on her by her husband in his life-time? It has not been pretended, that her husband bestowed any such authority upon her.

The question whether the father himself can give his only son in adoption, is a point upon which there is a conflict of opinion in India. It may be well to enumerate some of the principal authorities.

Three of the *Smriti* writers expressly prohibit such a gift.

(1) 10 Bom. H. C. Rep. 235.

(2) 10 Bom. H. C. Rep. 268.

(3) 10 Bom. H. C. Rep. 268.

(4) 2 Mad. H. C. Rep. 129.

Vasishta says :⁽¹⁾ " Let no man give or accept an only son, since he must remain to raise up a progeny for *the obsequies* of ancestors," and subsequently in the same text adds : " Through one son the adopter rescues many ancestors "—*i.e.*, from Put, the Hindu Hades. Baudhyana's text is, in the Dattaka Mimansa,⁽²⁾ mentioned as being to the same effect as that of Vasishta, and so much of that text as relates to the present point has been translated by Dr. Bühler in an article on the Çaunaka Smṛiti in the Asiatic Society of Bengal's Journal for 1866, p. 15, thus :

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" 1. We shall declare the rule for the adoption of a son."

" 2. (A son) is produced from the seed of the male and the blood of the female. His mother and father are the cause of his existence. His mother and his father have (therefore) the right to give him away, to abandon, or to sell him."

" 3. But nobody should give or receive an only son. For he is (wanted) to continue the line of his ancestors."

" 4. But a woman should neither give nor receive a son without the permission of her husband." &c. &c.

In Dr. Bühler's translation, (contained in the same article, p. 13,) of Çaunaka's text on adoption there is this passage : " No person, who has only one son, ought ever to give (him to be adopted); but a person, possessing many sons, ought anxiously to do so."

Omitting the interpolations from Balambhatta (Lakshmidēvi) and other commentators, pl. 9 of ch. 1, sec. xi, of the Mitākshara runs thus : " He who is given by his mother with her husband's consent, while her husband is absent, or after her husband's decease; or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (*dattakā*). So Manu declares : ' He is called a son given (*datṛimā*) whom his father or mother affectionately gives as a son

(1) Cole. Dig., Bk. V, ch. iv, sec. 8, pl. cclxxiii.

(2) Sec. v, pl. 42, and see pl. 31.

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being alike (by class), and in a time of distress : confirming the gift with water.' ”

“ 10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver.”

“ 11. So an only son *must* not be given. For Vasishtha ordains ‘ Let no man give or accept an only son.’ ”

“ 12. Nor though a numerous progeny exist, *should* an eldest son be given : for he chiefly fulfils the office of a son, as is shown by the following text : ‘ By the eldest son as soon as born, a man becomes the father of a male issue.’ ”

Notwithstanding the observations in *Chinna' Gaundana* v. *Kumára Gaundana* ⁽¹⁾ and 1 Stra. H. L. 87 as to the injunctions with respect to only sons as well as to eldest sons being merely directory, it is manifest that there is a stronger reason for prohibiting the gift of an only son than an eldest son, and it may not be unworthy of remark that the learned translator, Mr. Colebrooke, in rendering the above passages in the *Mitákshara*, employs, with regard to the only son, the expression ‘ must not’, and with regard to the eldest son the expression ‘ should not’. This distinction is, as will presently appear, even more strongly marked in the *Vyavahara Mayukha*, which treatise is, as is well known, a high authority here. And Balambhatta’s commentary on the prohibition of the gift of an only son, contained in pl. 11 above extracted from the *Mitákshara*, is : “ Nor should such a son be accepted. The blame attaches both to the giver and to the taker, if they do so.”

The Dattaka *Mimansa* says that “ the capacity to give consists in having a plurality of sons”, &c.,⁽²⁾ and that he who has one son only is ‘ *ekaputrá*’, or one having only one son : by such a one the gift of that son must not be made : for a text of Vasishtha declares ‘ an only son let no man give,’ ” &c.,⁽³⁾ and in the following passages the author condemns the giver and receiver of an only son

(1) 1 Mad. H. C. Rep. 54. (2) Sec. v, pl. 14 ; and see sec. iv, pl. 1.

(3) Sec. iv, pl. 2.

in the strongest terms, and says that the prohibition applies to both, that each alike incurs the penalty of "extinction of lineage", and such an adoption cannot be made even in a time of calamity.⁽¹⁾ According to him it is merely as a *divyámushyayana* that an only son can be given in adoption.⁽²⁾

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In discussing the case of *Mhalsubai v. Vithoba* ⁽³⁾ I shall state the doctrine of the Dattaka Chandrika on this point, and, therefore, pass over that treatise for the present.

The Vyavahara Mayukha in treating of the eldest and only sons, first mentions the eldest,⁽⁴⁾ and says that Çaunaka's prohibition of his adoption applies to the giver and not to the taker. He next,⁽⁵⁾ again quoting Çaunaka, says: "By no man having an only son (*ekuputrā*) is the gift of a son to be ever made. By a man having several sons (*bahuputrā*) such gift is to be made on account of the difficulty (*prayatnatas*)." "On account of difficulty" means in the event of distress or calamity, and subsequently ⁽⁶⁾ he quotes the already given text of Vasishtha: "But let no man give or accept an only son, for he is destined to continue the line of his ancestors. Let not a woman give or accept a son without the assent of her husband." He carefully abstains from affirming that this express prohibition, by Vasishtha, of giving or receiving an only son, or the previously mentioned text of Çaunaka, is to be limited to the giver only. Remembering what he did say with regard to the eldest son, his omission to repeat that remark with respect to the only son is important, challenged, as he was, by the text of Vasishtha to make such a remark, if there were grounds for it. That omission implies that the prohibition to adopt an only son was, by Nilakantha, deemed imperative. To whichever, therefore, of the two principal authorities in this Presidency we look, viz., the Mitākshara and the Mayukha, we find an absolute prohibition of the giving of

(1) Sec. iv, pl. 3, 4, 5, 6 and 8. (2) Sec. ii, pl. 36, 37, 38, 44, 49.

(3) 7 Bom. H. C. Rcp., Appx., p. xxvi. (4) Ch. iv, sec. v, pl. 4, 5.

(5) *Ibid.* pl. 9.

(6) *Ibid.* pl. 16.

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an only son in adoption, and, at the very least, a strongly implied prohibition in the latter of the taking also, and a similar implied prohibition deduced from the former by Balambhatta. These are followed up by a most distinct and reiterated prohibition in the next highest authority on adoption in this Presidency, the Dattaka Mimansa, of both the giving and taking of an only son ; and an examination of the Dattaka Chandrika, which ranks next to the Dattaka Mimansa, discloses, as will presently be seen, no different doctrine.

From the Smriti writers and great commentators upon them, who all seem to be of one accord on the incapacity of a father to give his only son in adoption, we pass to the decisions of the Courts, and to the *vyavasthas* and modern writers, and here the discord of opinion is considerable.

Sir Thomas Strange holds the prohibitions as to an eldest as well as to an only son to be directory, but admits that Mr. Sutherland (the especial expert on the subject of adoption, and translator of the two great works on that topic) questioned his proposition so far as regarded an only son "on the ground, according to him, that the prohibition of Vasishta (Mitak. on Inheritance, ch. i, sec. xi, pl. 11) attaches to the *adoption* as well as to the gift."⁽¹⁾ Sir Thomas Strange seems to have been led to his opinion by Mr. Ellis ; but that opinion is opposed to the higher authority, not only of Mr. Sutherland but of Mr. Colebrooke, who, like Mr. Sutherland, says that "a valid adoption of an only son cannot be otherwise" (*i.e.*, than as a *dwyámushyayana*) "made, the absolute gift being forbidden,"⁽²⁾ and, as authority for this, he refers to the passage in the Mitákshara, on which Mr. Sutherland also had relied.

The answers of the shástris and the decision of the Sadar Adálat in *Huebut v. Govindráv*⁽³⁾ are favourable to the validity of the adoption of an eldest or only son. It is not, however, quite clear in that case whether Malharráv had only two

⁽¹⁾ 1 Stra. H. L. 87, note 2, and Suth. Syn. II, cl. 4.

⁽²⁾ 2 Stra. H. L. 107.

⁽³⁾ 2 Borr. 75 (1st ed.) ; 83 (2nd ed.).

sons or three. He himself alleged that he had three, one of whom, Chinnáji (not his eldest), he gave in adoption to Venkatráv, his first cousin once removed, and subsequently another, Govindráv, the plaintiff and respondent, who was his eldest son, to Gangábái, the widow of his (Malharráv's) deceased brother Khanderáv *alias* Balvantráv. The Court in its question to the shástri seems to have assumed that Malharráv had only two sons. If that were so, the adoption of Govindráv would seem to have substantially been the adoption of an only son, the younger son having been previously given away (see 2 W. Macnaghten's H. L., p. 178, Case III). But neither in the text nor in the table of answers of shástris does the question of the validity of the adoption of an only son appear to have been put directly in that case to the shástris. Some of the questions in the text bore upon Govindráv being an eldest son, but in the table there are not any questions as to an eldest or only son.

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The note to 1 W. Macnaghten's H. L. at p. 67 is at complete variance with the cases in his second volume at pp. 178, 179, 182, 192, 195, and other cases hereinafter mentioned.

I have examined the papers amongst our records in the unreported case of *Nilkanth Náráyan Kulkarni v. Gurnáth Shripat, the heir of Shripat Appá, deceased*,⁽¹⁾ decided by the Bombay Sadar Adálat A. D. 1839. The plaintiff Nilkanth (who was also the special appellant) instituted the suit in the Mámlatdár's Court against Lakshmává, widow of Náráyan Shesháli, and (as I understand the papers) against Shripat Appá, who would seem to have died *pendente lite*, and one of his sons, Gurnáth, was probably substituted for him as a defendant. The suit may, however, have been brought against Gurnáth in the first instance, and not against Shripat Appá. Its object was to recover the moiety of a kulkarni *vatan*. The plaintiff alleged that he had been adopted by Lakshmává as a son to her deceased husband, Náráyan, about forty-two years previously—i. e., about A. D. 1797 (Fasli 1806-7)—and that such adoption had been recognized

(1) Special Appeal No. 1419.

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by the native government, that, he being a minor, the management of the *vatan* remained in the hands of (as I understand the papers) Shripat until Fasli 1227, when the plaintiff took possession of his share in the *vatan* and held it until Fasli 1229, and that in Fasli 1240 the defendant Shripat "by force got possession". There is some inconsistency here in the case made by the plaintiff not explained by the papers available amongst our records, as he had previously represented himself as holding the *vatan* from Fasli 1227 to 1229 only. The defendant Shripat (as I understand the papers, it may, however, have been his son Gurnáth) replied "that the adoption did not take place," he (the defendant) "having declined to sanction it, as Nilkanth was his eldest son, and as such a proceeding would have been contrary to the *shástra*." He also said that the other defendant, Lakshmáná, had voluntarily, under a *kararnáma*, given up the share of her deceased husband to him. The Mámlatdár made a decree in favour of the plaintiff in A.D. 1831, upholding his adoption, which decree, however, was made *ex parte*, and there is nothing to show that the Mámlatdár took the opinion of any *shástri* on the matter. The second defendant, Gurnáth, appealed to the Zilla Judge (Mr. J. A. Shaw) of Dhárwár, the main point of appeal apparently being that the plaintiff Nilkanth was the first-born son of his natural father, and, therefore, that by Hindu law the adoption was invalid. Mr. Shaw having taken the opinion of his Court *shástri* on that question, and finding it to be in accord with the objection made by the defendant (and appellant) Gurnáth, viz., "that the eldest son could not be given," declared the adoption to be invalid, reversed the Mámlatdár's decree, and rejected the plaintiff's claim with costs. As to the alleged confirmation of the plaintiff's title by the native government, Mr. Shaw said that the *sanad*, adduced in proof of that allegation, related to a different *vatan* not within the territories of the East India Company, and could not affect the case. The plaintiff made a special appeal to the Sadar Adálat, on the ground that there was evidence in the case showing that, by the

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custom of the caste, to which the parties belonged, in that part of the country, an eldest son might be adopted, and, consequently, that the Zilla Court ought not to have preferred the law as laid down in the shástra. He also denied that he was an eldest son, and said that he had two elder brothers who were then dead. The shástri of the Sadar Adálat, on being consulted, having (as I understand from the papers) said that the plea put forward by the plaintiff as to local and caste usage, if true, was "tenable", the Sadar Adálat (Giberne and Pyne, JJ.) admitted the special appeal for argument "on the grounds of the difference of opinion apparent in the lower Courts, and of there being precedents that, where the law of the Hindus differs with usage of caste or country, the latter is followed in preference to the former, the shástri of the Sadar Adálat Court having declared the same in a late case." This, no doubt, was a correct opinion. Evidence of usage of caste or country to the contrary of the general Hindu law is admissible, and, if satisfactory as to the antiquity and invariability of the usage, the latter will be preferred to the general Hindu law, but the burden of proof lies on him averring the usage. It is observable that the special appellant and the Sadar Adálat shástri do not appear to have denied that the general rule of Hindu law is that an eldest son cannot be adopted. The special appeal was finally heard and argued before Mr. Pyne; but the question as to the existence of the custom was not disposed of or remanded to the Court below, inasmuch as, although the plaintiff relied on two entries made in the name of "Nílkant Náráyan" in a *tákidpatr* and a *táliband*—by whom does not appear—it was admitted that in A.D. 1807 and again in A. D. 1825 he had signed his name as "Nílkant Shripat", which Mr. Pyne was of opinion he would not have done if there had been any *boná-fide* adoption of him by Náráyan or his widow Lakshmavá: so the decree of the Zilla Judge was affirmed with costs, and the special appellant carried the case no further.

In another unreported case, *Bomlingappa, alleged heir by adoption of Maláppá, deceased, v. Sakrává, widow of*

1875. *Maláppá*, decided in the Sadar Adálat of Bombay, A.D. 1843,⁽¹⁾ I have examined the papers. The plaintiff sued to recover a share in a *vatan* of considerable value in right of *Maláppá Desái*, who was a co-sharer with others in the *vatan*. The plaintiff alleged that he was adopted by *Maláppá* in the Fasli year 1222 (A.D. 1812-13), who died nine years afterwards. The defendant, who was the widow of *Maláppá Desái*, denied the plaintiff's adoption, said that he, being the eldest son of his natural father *Basáppá*, could not be adopted, and that, in fact, *Maláppá* had adopted another person (*Nenáppá*) in the same year in which the plaintiff alleged that he was adopted. The Principal Sadar Amín found that *Maláppá Desái* had adopted the plaintiff with all due form, and that the defendant failed to prove that *Maláppá Desái* had adopted *Nenáppá*. The Principal Sadar Amín consulted the shástri of his Court, who "was of opinion that the plaintiff, being the nephew of *Maláppá*, was a fitting person for adoption," and the Principal Sadar Amín accordingly made a decree for the plaintiff, *Bomlingáppá*. The defendant appealed to the Zilla Judge of Dhárwár, on the ground (*inter alia*) that the plaintiff was the eldest son of his natural father. The Zilla Judge, Mr. J. H. Pelly, consulted the shástri of his Court as to the validity of that ground of appeal. The shástri "plainly stated that the eldest son cannot be adopted." Mr. Pelly, having also considered the question of "the custom of the country" and referred to four documents in evidence before him as to that custom, came to the conclusion that the custom was conformable to the law as laid down by his shástri, and accordingly reversed with costs the decree of the Principal Sadar Amín. The plaintiff made a special appeal to the Sadar Adálat. Two of the Judges (one of them being Mr. Pyne) admitted the appeal for argument on account of the conflict between the decisions of the lower Courts; Mr. Pyne, however, saying in his minute, made on that occasion, that the law, on which the Zilla Judge reversed the decree of the Principal Sadar Amín, was in his (Mr.

(1) Special Appeal No. 1958.

Pyne's) opinion "indisputably sound". The hearing afterwards took place before Mr. Pyne, from whose decree it would appear that for the plaintiff it was contended before him that "the custom of the country" and not "the law of the shástra" should have been considered; but Mr. Pyne held that the plaintiff had by appealing "to the law of the shástra," viz., by submitting a question in the Principal Sadar Amín's Court to his shástri as to the law of the shástra affecting his case, in which question, however, he "concealed" the fact that he was an eldest son, debarred himself from saying that the law of the shástra should not be taken into consideration. Mr. Pyne having orally consulted the shástri of the Sadar Adálat as to the validity of the adoption of an eldest son, and finding his opinion to concur with that of the shástri of the Zilla Court, declined to enter upon the question of custom of the country, and affirmed with costs the decree of the Zilla Judge. It will be remembered that the latter had found as a fact that the custom of the country was against the adoption of an eldest son. The plaintiff appears to have acquiesced in Mr. Pyne's decree by not carrying the case any further.

Aná, the adopted son in *Abáji Dinkar v. Gangálhar Vásudev Gosavi*, ⁽¹⁾ was an eldest, not an only son. The pedigree shows that he had three younger brothers. He was given by his father. The Munsif, for various reasons not material here, disallowed the adoption. The Zilla Judge, Mr. Remington, reversed his decree, and remanded the cause. Another Munsif, on the re-trial, disallowed the adoption for reasons not here material. The Zilla Judge reversed his decree, and, with reference to the point that the adoptee was an eldest son, said ⁽²⁾ that the prohibition of such an adoption was against the giver only, and did not invalidate the adoption. The Sadar Adálat Judges (Mr. Harrison *dissentiente*) upheld Mr. Remington's decree, but were silent altogether as to the fact of the adoptee being an eldest son. The less said about the judgments the better.

(1) 3 Morris S. D. A. Rep. 420, decided in 1856.

(2) 3 Morris S. D. A. Rep. 424.

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In *Vishram Baburav v. Narainrav Kasi* ⁽¹⁾ the defendant and respondent Narainrav was an only son, whose uncle Kasi went through the form of adopting him. The Munsif, Tirmalrav Venkatesh, a native Judge of considerable experience, found the adoption to be invalid on the ground (*inter alia*) that Narainrav was an only son. It does not appear in the report or in the papers in the case amongst our records (which I have examined) by whom he was given in adoption; it is, however, most probable that the gift was by his natural father; otherwise there would have been a special objection made to a gift by his mother if a widow, and she could not, without her husband's express authority, have given Narainrav in his father's life-time.⁽²⁾ On an appeal to the Zilla Judge (Mr. Remington) the two unreported Special Appeals Nos. 1419 and 1958 (of which I have already stated the substance from the records of the Sadar Adalat) were cited to him on behalf of the respondent. The Zilla Judge (Mr. Remington), however, declined to follow those cases. Admitting that they were in point (they were, in fact, more than in point, for if the adoption of an eldest son is invalid, *a fortiori* the adoption of an only son would be so) he said: "The Court, however, observes that, though a period of more than three years elapsed between the dates of these decrees, they were pronounced by one and the same Judge, and not by a full Court, and that they have had no place assigned them among the selected cases printed for professional use, though deciding points of great and universal interest. It cannot be overlooked that the question referred to the shastri was rather a limited one, being confined to the ascertainment of this, whether the adoption of an eldest son was good, and not whether, if a wrong act in itself, it ought on that ground to be set aside after formal completion." Here we must observe that the learned Zilla Judge's reasoning is not of much force, inasmuch as it is scarcely possible to find cases worse selected or worse reported than those in the published reports of the Bombay

(1) 4 Morris S. D. A. Rep. 26.

(2) See *Narayan Babaji v. Nand Manohar*, 7 Bom. H. C. Rep. 153, A. C. J.

Sadar Adálat, especially since Borrodaile's Reports, which, though very far from being good, are better than their successors. Further, the questions put to the shástris on both occasions seem to have been whether or not the adoption was invalid,—a question which included within it the question whether or not the *factum-valet* principle was applicable; if it were, the adoptions would not have been invalid, although they may have been reprehensible. Mr. Remington continued: "And it is to be noticed, as not without significance, that the native Courts, represented by a Mámlatdár and Principal Sadar Amín, both decided in favour of the adoption which was afterwards set aside." In the case Mr. Remington was then deciding, as well as in *Abáji Dinkar v. Gangádhara Vásudev Gosávi*,⁽¹⁾ which he also decided, and in both of which cases he upheld the adoptions, the lower Courts had come to conclusions opposite to those at which he had arrived—whatever may be the value of that circumstance; and we have already noticed the fact that the Mámlatdár in S. A. 1419 pronounced his decree *ex parte*. The Zilla Judge referred to 1 Morley Dig., Adoption, art. 40, which treated adoption of an only son as invalid, except when he is adopted as a *dwýámushyayana*, a ruling against the decision of Mr. Remington, as the case before him does not appear to have been an adoption of that nature. The Madras decision at article 41, indexed in the same volume of Morley to which he referred, seems to have been in point as being an application of the rule *factum valet*. But article 43, also referred to by him and expressed under a *semble*, was the opinion of only one Judge (Mr. Courtney Smith) in which the majority of the Sadar Adálat of Bengal did not concur (*vide* 4 S. D. A. Rep., pp. 70, 78 and 79). The passage in 1 Strange H. L., to which he refers, we have already mentioned. He appears also to have referred to 1 Borr. 662,⁽²⁾ which appears to be a mistake for 2 Borr. 662 (1st ed.); 719, 720 (2nd ed.). Those pages occur in the report

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(1) 3 Morris S. D. A. Rep. 420.

(2) There are only 418 pages in the first volume (1st ed.), and 500 pages in the second edition of the same volume.

1875. of *Ruvee Bhudr v. Rupshankar Shankarji*,⁽¹⁾ but that case
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 v. adoption of a wife's brother's son rightly held to be valid,
 RA'MA'VA' and which, like any other valid adoption, the adoptee could
 AND not renounce. Upon the authorities which I have stated
 OTHERS. Mr. Remington as having referred to, and, to use his own
 words, "considering the decision of the superior Court" (*i.e.*,
 the Sadar Adálat in the two unreported cases) "as affirm-
 ing the doctrine against an eldest and only son being given
 in adoption, did not decide that such an adoption, being once
 made, ought to be set aside," he held that the adoption of
 Náráinráv could not "be called in question", and reversed
 the decree of the Munsif with costs. I have discussed thus
 fully the judgment of the Zilla Judge as he attempted to
 give reasons for his decree. The Sadar Adálat (which was
 then very far from being strongly constituted), without, so
 far as the report shows, any examination of the authorities,
 affirmed his decree—simply saying "that there is no point
 of Hindu law more firmly decided than that an adoption,
 once made in proper form, cannot be set aside, though both
 the giver and receiver in adoption may have committed sin
 in allowing it"—an assertion almost ludicrous when the
 remarkable conflict of decisions and the *vyavasthas* on the
 subject (which *vyavasthas* we shall presently mention) are
 remembered, and so sweeping that, if true, it would render
 unimpeachable a gift in adoption with the proper form by
 C of the child of A and B without their knowledge or
 consent.

In *Chinna Gaundan v. Kumára Gaundan*⁽²⁾ it was held
 in 1862 in Madras that such a gift in adoption of an only son
 is sinful but valid, thus following 1 Strange H. L. 87, on the
factum valet quod fieri non debuit principle. Subsequently,
 in 1868, the very opposite was held in the High Court at
 Calcutta by two very able and experienced Judges, L. S.
 Jackson and Mitter, JJ., who distinctly refused to follow the
 Madras case or to apply the *factum-valet* doctrine—*Rájá*

(1) Commencing at 2 Borr. 656 (1st ed.), 713 (2nd ed.).

(2) 1 Mad. H. C. Rep. 54.

Upendra Lal Roy v. Shrimati Ráni⁽¹⁾—on which doctrine the observations of Mitter, J., are well worthy of consideration. In *Ráje Vyankatráv v. Jayávantráv*,⁽²⁾ a Sudra case, it is not stated in the report by whom the defendant Jayávantráv was given in adoption. He is spoken of by counsel as an only surviving son of his natural father; but whether he was so at the time of the adoption, does not appear (see *Mt. Dullabh De v. Manu Bibi*.⁽³⁾). It was also said by counsel that the defendant was a father, possibly a grandfather, but it does not appear whether either of his parents was living at the time of the adoption; if both of them were then dead, the decision there would certainly, according to other cases here and at Madras, be unsustainable.⁽⁴⁾ The *dictum*, therefore, in one of the judgments in that case, at page 195 of the report, that “the rulings of this Court as shown from 2 Borrodailo, p. 83 downwards, as also of the Calcutta Courts have been that an adoption once made cannot be set aside,” is, as has been shown, even in Bombay, far from accurate, and it is as to the Calcutta Courts almost wholly erroneous. The learned Judge who spoke thus was himself afterwards a member of the Court which decided *Naráyan Bábaji v. Náná Manohar*,⁽⁵⁾ where an adoption was treated as absolutely invalid, although it was not there asserted that all the forms and ceremonies required by the Vedas were not duly performed. The cases in 2 W. Macnaghten H. L., pp. 178, 179, 182, 192, 195; 2 S. D. A. Rep. 169; 3 S. D. A. Rep. 232; S. C., on review, 4 S. D. A. Rep. 70—all condemn as invalid the adoption of an only son. The Supreme Court Case, *Joymoney Dossee v. Sibosandery Dossee*⁽⁶⁾ stands, I believe, alone. No Hindu authority appears to have been quoted for the conjecture or assumption that the adoption of Kallycoomár, there sustained, was as a son of two fathers. In the case of *Mt. Tikday v. Lállá Hureelal*

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(1) 1 Beng. L. R. 221, S. C. 10 Cal. W. R.

(2) 4 Bom. H. C. Rep. 191, A. C. J.

(3) 5 S. D. A. Rep. (Calc.) 50.

(4) See *Balvantráv Bháskar v. Bayabái*, and 5 Bom. H. C. Rep. 83 O. C. J. *Subbáluvammal v. Ammakutti*, 2 Mad. H. C. Rep. 129; *Báshetiáppá v. Shivlingáppá*, 10 Bom. H. C. Rep. 268.

(5) 7 Bom. H. C. Rep. 153.

(6) Fulton Rep. 75.

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(Calc. W. R. 1864, p. 133) it was held that the adoption of an only son as a *kurta-putrá* (by which is probably meant a *krita-putrá*) amongst Sudras is valid. *Kritrimá* adoption stands on a footing peculiar to itself (*vide* 7 Calc. W. R. 700), and does not affect the general question. In this Presidency that species of adoption does not exist. There is not in the books any ground for drawing any distinction between Sudras and other classes on the question of the legality of the adoption of an eldest or only son. The case just cited seems to have received but little consideration. We have already mentioned the more recent case of *Rájá Upendra v. Shrimati Rání*⁽¹⁾ where by L. S. Jackson and Mitter, JJ., the adoption of an only son was treated as absolutely invalid, a decision of which Arnould, J., in *Bhaskar Trimbak Achárya v. Mahádev Rámji*⁽²⁾ expressed his approval. With the exception of the reference to 2 Borr., p. 83, I do not observe that the authorities on the adoption of an only son were examined in the case of *Ráje Vyankatráv v. Jayavantráv*.⁽³⁾

Amongst my brother West's MS. collection of *vyavasthas* of shástris in this Presidency (as yet unpublished so far as they relate to adoption, with which subject he and Dr. Bühler have yet to deal), one (No. 1632) is: "A man cannot give his only son in adoption, and replace him by adopting another." Another (No. 1631) is: "The Smritis prohibit the adoption of an only son." Another (No. 1626): "Adoption of an only son is *invalid*;" No. 1623 is to the same effect. Another (No. 1614) is: "An only son desiring to be adopted; it was answered that this was *prohibited*." No. 1612 is: "An *eldest* son may be given in adoption to a widow." In No. 1750: "An adoption was pronounced *illegal* on the grounds that the adopted son was of a different caste from the adopting widow, and was an only son." No. 1746 is: "The only son of one deceased cannot give himself in adoption." No. 1695 is: "An only son *cannot* be given in adoption; but there is no express provision for setting.

(1) 1 Beng. L. R. 221. (2) 6 Bom. H. C. Rep. 1 O.C.J. See p. 4.

(3) 4 Bom. H. C. Rep. 191, A.C.J.

aside an adoption made with the due ceremonies." No. 1677 is: "An only son cannot be given in adoption to a brother." No. 1684 is: "Both the giving and taking of an only son of a brother are prohibited by the shāstras. The giving of an eldest son is prohibited, but not the taking." (See 2 Strange H. L., 105; Mitāk., ch. i, sec. xi, 21.) These *vyavasthas* show that the current of authorities was strongly against the validity of the adoption of an only son in this Presidency.

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At page 17 of a collection of *vyavasthas* given to the S. D. A. of the N.-W. Provinces, published at Agra in 1861, the question put is: "Can a man's only son be adopted by another person"? The answer is: "The adoption of an only son is invalid." In another *vyavastha* in the same book, at page 16, it is stated that the adoption of an eldest son is not valid.

We do not propose now to give any final opinion on the question whether a gift in adoption of an only son *by his father* is, in this Presidency, void, but are content, for the purposes of this case, and for those purposes only, to assume that it is not so, that the texts in relation to it are directory only, and that, if such an adoption were made in opposition to those texts, the principle *factum valet* should be applied to it.

We must, however, remember that in making that postulate we assume that which is much contested. It, therefore, is necessary that we should be most cautious previously to making a step far in advance of even that proposition, which it would be to hold that a gift, by a widow, of her deceased husband's eldest or only son without express authority given by the husband to that effect, is valid. While disposed to admit that in this Presidency a widow, whose husband has not by direct prohibition or otherwise indicated his unwillingness that she should after his death give a younger son in adoption, may so give the latter, and that her husband's assent to such a gift may be implied, we do not see how it is possible, consistently with the Hindu

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law or religion, to imply the assent of a husband, who has made no indication of his pleasure in the matter, to the gift, by his widow, of an eldest and still less of an only son in adoption. As already stated, it never has been pretended that Bhágirthibái gave the plaintiff as a *dwýámushyayana*, i.e., as a son to Sitáramáppá, but still retaining his position as a son to his natural father, and, notwithstanding the case in Fulton's Reports, p. 75, we do not perceive how we could make any assumption that the adoption of the plaintiff was only of that limited and special character.

In fact, he has brought this suit as Lakshamáppá bin Sitáramáppá Náik Inámdár, and has altogether dropped the name of his natural father, and claims the full rights consequent upon an ordinary adoption, and, under *such* circumstances, a different form of adoption such as that of a *dwýámushyayana* cannot be presumed: *Mt. Eedul Koonwar v. Koonwar Debee Singh*.⁽¹⁾ Taking the view most favourable to the plaintiff, if he were the only son of his natural father, and the latter had himself given the plaintiff in adoption, he (the natural father), if his act of gift were not altogether invalid, would, at the least, according to the Hindu religion, which he professed, have committed a grievous sin in giving away his only son, whose religious duty it would be to perform the *shráddh* ceremony, not only of his natural father, but of his ancestors, which the plaintiff could no longer do after his adoption if valid: Miták. ch. i, sec. xi, pl. 32; Vyav. Mayukha, ch. iv, sec. v, pl. 21; Datt. Mim., sec. i, pl. 5, 42, 52, 55, 59; sec. ii, pl. 45; sec. v, pl. 31, 37; sec. vi, pl. 10. But the natural father did not give the plaintiff in adoption. We are of opinion that, in the absence of clear and convincing evidence of express authority conferred by him on his wife, Bhágirthibái, to give his son, the plaintiff, in adoption, any such gift by her would be wholly without authority, as it would be impossible to imply an authority from her husband to her to commit on his behalf, after his death, a sin which, according to the religion of the parties, would, at least, jeopardize, if

(1) 5 Dec. N.-W. P. 341.

not be fatal to, the spiritual interests of himself and his ancestors. Sir James Colville in giving the judgment of the Privy Council in *Nilmadhūb Doss v. Bishumber Doss* ⁽¹⁾ said: "Again, if there is, on the one hand, a presumption that Guruprashād Doss would perform the religious duty of adopting a son, there is, on the other, at least, as strong a presumption that Parmānand would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwyāmushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." I may here mention that in *Debee Dial v. Hur Hor Singh*, ⁽²⁾ which was a case that came from Benares, it was eventually held in the Bengal Sadar Adálat, in 1828, that a woman after her husband's death is incompetent to give their only son in adoption even as a *dwyāmushyayana* without the previously given express authority of her husband, and the gift in adoption of an only son was held to be completely invalid and void. When a father gives his only son in adoption as a *dwyāmushyayana*, he consents to deprive himself of one-half of the spiritual benefit derivable from the performance of religious obsequies. Hence his consent cannot be implied to even such a gift when made by his widow after his decease. To such a case the *factum-valet* principle is wholly inapplicable; for the attempted adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*. Where there is an absence of authority to give, there cannot be any gift. The attempt to give is a mere nullity. In such a case the Court should not be asked to set aside the transaction, but to declare it to be null and void *ab initio*. Possibly, in some cases where a father is enjoined not to give in adoption, and such an injunction is merely directory, and not mandatory, the *factum-valet* principle would be applicable. But this could not be so where there was incapability to give. The capacity to give is a *sine qua non* to the validity of an adoption: Datt.Mim., sec. v, pl. 13, 14; Vyav. Mayukha, ch. iv, sec. v, pl. 8, 36, 40. Any power, which the widow may

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(1) 13 Moore Ind. Ap. at p. 100.

(2) 4 S. D. A. Rep. 230.

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have to give the son of her husband and of herself in adoption, rests solely upon his authority to that effect, express or implied, and no Court would be justified in implying such an authority where the husband is by his own law and religion forbidden to make such a gift.

The only case in which we can find that a gift in adoption of an only son by a widow has been upheld, is *Mhālsābāi v. Vithobā*.⁽¹⁾ We think, after the best consideration which we have been able to give to that case, that it is unsound in principle as well as unprecedented, in so far as it went to support the gift in adoption, by a widow, of an only son without the authority of her husband, and we must respectfully decline to follow it. The first authority cited for that portion of the decision of the Court in that case is the *Dattaka Chandrika*, sec. 1, pl. 31, 32.⁽²⁾ We must premise as to that treatise that, though it may rank higher in the Dravida country than the *Dattaka Mimansa* of Nanda Pandita, it is inferior in authority to the latter in this Presidency, and in cases of conflict does not here prevail against it, except when supported by other authorities held in high estimation here.⁽³⁾ Our next observation is that *placita* 31 and 32 treat only generally of a woman's right to give in adoption, and the author cannot reasonably be regarded as, in those *placita*, empowering her to do that which [in *placitum* 29 he had expressly in the following manner forbidden her husband to do.

“29. In answer to the question by whom is a son to be given? Çaunaka declares: ‘By no man having an only son is the gift of a son to be ever made. By a man having several sons, the gift is to be anxiously made.’”

“30. The author apprehending the extinction of lineage in case of the gift of a son by one even having two sons, says: ‘By one having several sons.’”

(1) 7 Bom. H. C. Rep. Appx., p. xxvi.

(2) Pl. 42 is mentioned evidently by mistake for pl. 32.

(3) See *Nārāyan Bābaji v. Nānā Manohar*, 7 Bom. H. C. Rep. at p. 165, and 1 West and Bühler., Introd., 11.

Devanda Bhatta thus not only cites Çaunaka's remark, prohibiting the gift of an only son, but from the word 'several' used by him, infers that a man who has only two sons ought not to give either of them in adoption. Again in *placitum* 32, in which he says that a gift in adoption may be made by a woman with his sanction if her husband be alive, or even without it, if he be dead, have emigrated, or entered a religious order, he quotes the old Smṛiti text of Vasishṭa : "Let not a woman either give or receive a son unless with the assent of her husband;" and in *placitum* 32 says : "Now if there be no prohibition, even there is assent on account of the maxim—'The intention of another not prohibited is sanctioned.'"—clearly showing that in saying that a woman might give in adoption without the assent of her husband, if he be dead, &c., he only meant without his express assent, for by admitting that she could not give in adoption if the husband prohibited her from doing so, he admitted that the will of the husband was supreme in the matter, and that her right to adopt depended on his implied assent; and, indeed, Sausse, C.J., in the passage quoted from his judgment in *Mhālsābāi v. Vithobā* ⁽¹⁾ speaks of implied assent, but adds that the husband's assent will be implied if he have not previously manifested dissent—which is, in our opinion, too broad an assertion, and should have been limited to cases in which such an implication can be properly made.

The next authority referred to in that case is Mr. Colebrooke's note to the *Mitākshara*, ch. 1, sec. xi, pl. 9, who commences by a reference to the texts of Vasishṭa. Of these the earlier text—"Man, produced from virile seed and uterine blood, proceeds from his father and mother, as an effect from its cause. Therefore both his father and mother have power to give, to sell, or to abandon their son"—is qualified by the subsequent text of the same Smṛiti writer : "Let not such a woman either give or accept a son, unless with the assent of her husband." In treating in that note

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(1) 7 Bom. H. C. Rep., Appx., p. xxvi.

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of the power of a widow or wife to give a son it is evident that Mr. Colebrooke and Balambhatta, whom he there quotes, are speaking of that power only generally, and not with reference to the case of an eldest or only son. We have already seen that Mr. Colebrooke ⁽¹⁾ and Balambhatta, ⁽²⁾ when specially treating of the gift in adoption of an only son, both maintain that such a gift, even by his father, is strictly prohibited, and Mr. Colebrooke expressly says invalid unless the gift be as a *dwyamushyayana*. It is impossible, we think, to suppose that either of these authors intended it to be inferred that a widow might, without express authority, do that which they regarded her husband as debarred from doing. Sausse, C.J., referred also to 1 Strange H. L., 82 and 95; but Sir T. Strange nowhere says or invites the inference that a widow could, without the express authority of her husband, give an only son in adoption; and the Mitākshara, so far from leading to such a conclusion, discountenances the gift, by anybody, of an only or eldest son. The Chief Justice also referred to Vyav. Mayukha, ch. iv, sec. v, pl. 1, which embodies the text of Manu, and a comment of Madana to the effect that, if the father be dead, the mother alone may give away the son; but here, again, the subject of gift in adoption is merely dealt with generally, and not with reference to the special case of an only or eldest son; and it is not to be presumed that the sage or his commentator was intimating any opinion that the mother had any authority to do that which would have been either a sinful or invalid act on the part of the father. And Sir William Jones, in his translation of Manu, inserts in italics after the word "mother" in ch. ix, pl. 68, the words "with her husband's assent," a gloss of Kulluka Bhatta, the best commentator on Manu. ⁽³⁾ We do not mean to assert that in this Presidency the express assent of the husband is required in the case of younger sons, but we do hold that his assent, *express or implied*, is indispensable

(1) 2 Stra. H. L. 106, 107. As to an eldest son, *vide ibid.* 105.

(2) Mitāk. by Colebrooke, ch. 1, sec. xi, pl. 11, and annotations thereon.

(3) See Preface to translation of Manu, p. xviii, and 3 Dig., p. 261, pl. cclxxv, ch. iv, bk. v.

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to a valid gift in adoption by the widow, and that it cannot be implied by the Courts when the gift would be an act either sinful or invalid if performed by himself. The Chief Justice seemed to think that a son might give himself in adoption,⁽¹⁾ but this, we have seen, he cannot do, even if he were a younger son. The decision as to the validity of the adoption of an only son in *Mhalsabai v. Vithoba* is directly opposed to *Debee Dial v. Hur Horsing* ⁽²⁾ already mentioned. The last-mentioned case appears to have been a carefully-considered case, in which the three Judges of the Bengal Sadar Adalat and their shastri concurred, and was not cited in *Mhalsabai v. Vithoba*.

Where there is an absence of authority to give in adoption, the maxim *quod fieri non debuit factum valet* cannot aid the adoption. There is in such a case no *factum*. The transaction is a nullity. The reasoning in the note to 1 W. Macnaghten's H. L., that the adoption having once been made, the boy, *ipso facto*, loses all claim to the property of his natural family, is completely unsound when applied to an adoption which is invalid by reason of want of authority in the giver or on any other ground. An invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated : *Bawani Sari Kara Pandit v. Ambabay Ammal*. ⁽³⁾ Scotland, C.J., said there : "Acceptance by a woman without authority is no acceptance at all." So we say : "A giving by a woman without authority, express or implied, is no gift at all." Holloway, J., said : "How can there be an adoption in fact when that has not taken place which is necessary to constitute an adoption?" So we say : "How, when there has been nothing which the law can regard as a giving, can we hold that an adoption has taken place, there being two concurrent facts essential to any valid adoption, gift and acceptance, one of which at least is absent?" The cases are numerous, both in this Presidency, where the law of adoption is most lax,

⁽¹⁾ *Mhalsabai v. Vithoba*, 7 Bom. H. C. Rep., Appx., p. 27.

⁽²⁾ 4 S. D. A. Rep. 320.

⁽³⁾ 1 Mad. H. C. Rep. 363.

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and elsewhere in India, in which adoptions have been held invalid, and the maxim *factum valet* has not been applied,⁽¹⁾ although warm advocates of that maxim seem to have laid it down somewhat wildly, and as if it were applicable in every case in which the regular form of adoption had been gone through. To us it appears that its application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the shástra is merely directory, or only points out particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded.

We reverse the decree of the Subordinate Judge, and remand the cause for a re-trial. The costs of suit and appeal must abide the result of the new trial.

If the Subordinate Judge find that Rámáppá was adopted in a valid manner by Rámává before the alleged ceremony of the adoption by her of Lakshmáppá, the plaintiff, or that she did not adopt the plaintiff, there must, in either of these events, be a decree against the plaintiff. If the Subordinate Judge finds that Rámáppá was not adopted by Rámává previously to the alleged adoption of the plaintiff, and that she did adopt the plaintiff, but that he was the only son of his natural father at the time of the adoption, there must be a decree against the plaintiff, it not having been pretended that Bhágirthibái had been expressly authorized by his natural father to give the plaintiff in adoption. If the Subordinate Judge finds that Rámáppá was not adopted by Rámává previously to the adoption of the plaintiff, and that she did adopt the plaintiff, and that he was not the only son of his natural father at the time of the adoption, there should be a decree for the plaintiff.

(1) Ex. gr. 1 Mad. H. C. Rep. 420; 2 *Id.* 129; 3 *Id.* 283; 2 Knapp P. C. 203; 4 Moo. Ind. App. 1; 6 Bom. H. C. Rep. 83, O. C. J.; 7 *Id.* 153, A. C. J. *Ibid.* Appx. 1; 10 *Id.* 235, 241, 268; 2 S. D. A. Rep. 245, 169; 3 S. D. A. Rep. 232, 387; 4 *Id.* 70, 320; East's Notes, Case 20; 2 Morley Dig. 32; 2 W. Macnaghten H. L. 178, 179, 182, 192, 195; 1 Beng. L. R. 221; Bourke Rep. 189; S. C. 2 Ind. Jur. N. S. 24; 5 Beng. L. R. 362, &c., &c.

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Should the Subordinate Judge make a decree, upholding the adoption of the plaintiff, he should consider to how much of what the plaintiff claims he is justly entitled.

The allegation of the defendants being that the plaintiff was an only son, and there not being any allegation on their part that he was the eldest of more sons than one, we have limited the inquiry to the question whether he was an only son, and have said nothing as to his rights, if he were an eldest son, a case which, at this stage of the cause, we do not think the defendants would be entitled to set up.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 9 of 1874.*THE GOVERNMENT OF BOMBAY. (*Defendants*) *Appellants.*1875.
December 22.

HARIBHA'I MONBHA'I and

forty-five others (*Plaintiffs*) *Respondents.**Survey—Assessment—Jurisdiction—Bombay Act I. of 1865—Regulation XVII. of 1827—Prescription—Bombay Act VII. of 1863.*

The jurisdiction of the Civil Courts, in the Presidency of Bombay, in matters of revenue and land assessment considered and defined.

The enactments limiting the operation, in the Presidency of Bombay, of the maxim *nullum tempus occurrit regi* considered.

The land tenures of the district of Surat described.

The village of Kabilpur in the district of Surat is an *udhad bandhijama* village, settled for hereditarily and of right, by the co-sharers in it, in the gross at a fixed immutable rent, independent of the quantity of land under cultivation, payable to Government, and, as such, falls, in respect of the joint liability of the holders for the revenue in gross, within Sec. 8 of Reg. XVII. of 1827.

The village of Kabilpur is land, situated in a district ceded by the Peishwa in 1802 to the British, held by the co-sharers in it and their predecessors in title partially exempt from payment of land revenue, under a tenure recognised by the custom of the country, for more than 30 years, and, therefore, falls within the claims for exemption mentioned in Bombay Act VII. of 1863, Sec. 21.

Whether Sec. 2, Cl. 1 and Sec. 8 of Reg. XVII. of 1827 and Sec. 21 of Bombay Act VII. of 1863 are or are not controlled by Bombay Act I. of 1865, the village of Kabilpur is liable to assessment to the extent of Rs. 1,089-13-1 only, inasmuch as it falls within the concluding proviso in Bombay Act I. of 1865, saving from further assessment a village entered in the Land Register as partially exempt from payment of land revenue.

Comparison of this (the Kabilpur) case with that of *Kanara (Vyakunta Bapuji v. The Government of Bombay)* Appendix, *supra* p. 1.

THIS was an appeal from the decree of H. Birdwood, District Judge of Surat. The facts and arguments sufficiently appear in the judgment.

Scoble (Advocate General) and *Dhirajlál Mathurádás* (Government Pleader) for the appellants.

Branson and *Nagindás Tulsidás* for the respondents.

The appeal was argued before WESTROFF, C.J., and MELVILL, J., on 13th, 14th, and 15th December 1875. In the

1875. course of the argument the following authorities were cited :
 GOVERNMENT OF BOMBAY v. EARL BEAUCHAMP v. WINN (a), VAMAN JANARDHAN v. COLLECTOR OF THANA (b), COLLECTOR OF SURAT v. DAJI JOGI (c), and
 HARIEHA'I MONBHA'L SUB-COLLECTOR OF COLABA v. GANESH MORESHVAR (d).

On 22nd December 1875 the following judgment* of the Court was delivered by

WESTROPP, C.J. :—This is a regular appeal from the Court of the District Judge at Surat.

The suit was instituted by the present respondents, who are co-sharers in the village of Kabilpur (alias Kubirpore), in the pargana of Supa and Collectorate of Surat. By their plaint, presented on the 28th of February 1872, and filed on the 18th of March in the same year, they alleged that they and their predecessors in title had enjoyed the proprietorship of that village for several centuries, at a fixed rent never exceeding Rs. 1,174-4 Broach currency, down to A.D. 1871. They, in effect, stated that, after the making by Government of an illegal survey and measurement of that village, against which proceeding they had remonstrated by petition, their rights were infringed by the village being treated as ordinary Khalsa (Government) land, and its assessment enhanced to Rs. 4,106-9, which is a kamal (full) assessment. They prayed a declaration that this assessment is illegal, that they are entitled to the proprietorship of the village, and that it is not liable to a higher assessment than Rs. 1,089-13-1 (Government currency). The plaintiffs' reason for naming that sum, and not the precise equivalent in Government currency for Rs. 1,174-4 (Broach currency) will presently appear. The plaint also claimed a refund of Rs. 55 in respect of a matter not of any importance, which was waived by the plaintiffs at the settlement of issues. Besides the plaintiffs there are six other Desais

(a) L. R. 6 Eng. and Ir. Ap. 223.

(b) 6 Bom. H. C. Rep., 191, 194, 195, A. C. J.

(c) 8 Bom. H. C. Rep., 166, 172., A. C. J.

(d) 10 Bom. H. C. Rep., 216.

* Note.—The footnotes to this judgment are those of the Court itself.—*Ed.*

and eight Bhatelas, interested in the village, whose non-joinder as parties has not been objected to in this Court.

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The written statement in defence, filed on the 4th of July 1872, by the Collector of Surat on behalf of the Bombay Government, in its 4th and 5th paragraphs (to which alone of its contents the Advocate General deemed it necessary to call our attention) in effect asserted that the old records, as well of the Peishwa's Government as of the British Government, show that the proprietorship of the village is that of Government, and not of the plaintiffs; that no uniformly fixed sum had been theretofore levied thereon, but that the assessment fluctuated, and that accordingly Government had the right, under the Regulation of 1827 and the Survey Act (Bombay Act I. of 1865) and the rules framed thereunder, to survey and assess the village at pleasure (a).

A preliminary question as to the sufficiency of the stamp upon the plaint was disposed of by Mr. Newnham, then District Judge of Surat, and does not present itself here. He also settled the following issues for trial:—

1. Do the plaintiffs prove their right to pay only Rs. 1,174-4 (Broach currency) as assessment? (That figure was subsequently altered by way of amendment by permission of the District Judge to Rs. 1,089-13-1 Government currency.)

2. If not, is the Collector's action in imposing the higher assessment justified?

The trial took place before Mr. Herbert Birdwood, successor of Mr. Newnham as District Judge of Surat, and occupied nine days. Mr. Birdwood has conducted it with a patient and laborious industry, and an intelligence which are alike creditable to himself and to the administration of justice in the British Civil Courts in India. He (after

(a) The 3rd para. of the written statement objected that, the village being service vatan, the suit was not within the jurisdiction of the Civil Courts; but, both in the District Court and in this Court, the defendants waived that objection, and declined to contend that the village was held for service. The plaintiffs have throughout denied that it is so.

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taking time to consider the voluminous evidence, chiefly documentary) found the first issue (as amended) in the affirmative, and in favour of the plaintiffs. The second issue, therefore, did not arise. He accordingly made his decree, declaring "that the plaintiffs, as shareholders of Kabilpur, are not liable to pay a higher sum than Rs. 1,089-13-1 as assessment on that village, and that the proceedings, taken with the object of placing a full assessment upon the village under the Bombay Survey and Settlement Act, are illegal," and he ordered the defendants to pay all costs.

Mr. Birdwood has thoroughly examined and sifted the evidence in the case. In his appreciation of it, as stated at length in his judgment, we agree. The discussion of the evidence by him has been so full that it would be superfluous for us now to specify it in detail. We shall merely refer to some of its salient points. We have had the great advantage of hearing the learned Advocate General's opening statement on behalf of the appellants. It occupied the whole of the 13th and 14th instant. He has not spared any pains to make us acquainted with every important and relevant part of the evidence, and has so perfectly discharged that duty that Mr. Branson, for the respondents, was enabled to limit his speech to the forenoon of the 15th instant. The Advocate General concluded his reply in the afternoon of that day, and my brother Melvill and I have, after carefully considering the case, arrived at the opinion that the decree of the District Court must be affirmed. At the conclusion of the arguments, on this day week, we had no doubt that it had been satisfactorily proved that the plaintiffs (respondents) and their ancestors had, with certain rare and unimportant exceptions which ought not to influence our decision, enjoyed the village of Kabilpur at a fixed rent of Rs. 1,174-4 (Broach currency) for a period of about one hundred and eighty years, if not much longer. The plaintiffs do not produce any sanad. Whether their remote ancestors ever had one has not been established by direct evidence. The facts, which have been proved, might

possibly, if taken together, justify us in presuming a sanad ; but, upon that point, we deem it unnecessary to give any opinion, inasmuch as we are able to decide the case upon the Regulation and Acts without actually resorting to such presumption. There is distinct evidence that the Desais, under whom the plaintiffs derive their title, were A.D. 1657-58 (*i. e.*, 213 years before the recent enhancement of the assessment in 1870-71 now disputed) in possession of the village of Kabilpur.

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Exhibit No. 32 (dated Samvat 1714, Fusli 1065, *i. e.*, A.D. 1657-58), which proves that fact, was originally obtained from the plaintiffs by the defendants, and was put in evidence in this suit by the latter. It is not a Government record, although for some years it has been in Government custody, having been produced by the plaintiffs before Mr. Simpson (Collector of Surat) in 1842, and it was before Mr. Ravenscroft in 1855. These gentlemen were at those times inquiring into the tenure of the pargana of Supa. It is a private document, purporting to provide for the distribution of fifty-one villages in the pargana of Supa into four shares among the Desais thereof. Those 51 villages are described as the Desaigniri of Vasi Bhimji Gadadhar—and, so far as the terms of the document enable us to form an opinion, there is not any reason for believing that even then these villages were a new acquisition by the ancestors of the plaintiffs, the Desais. For aught that appears in that document to the contrary, their tenure may then have been ancient. The passage on which the Advocate General particularly relies is :—“ Even should there be any increase or decrease in the Jama Mushahas (stipulated revenue) of these villages in comparison with the Jama of the year 1064 Fusli (A.D. 1656-57) Samvat 1713, none shall swerve from this distribution.” Then follows an enumeration in detail of forty-four villages by name (not including Kabilpur) which are distributed into four divisions, each division being allotted to different persons. Another village (Modhara) is allotted to Morarji Bhimji. Then four other villages, namely Mansad, Kabilpur, Toli (Inam) and Tim-

1875. barni are described as remaining "in the co-parcenership of four shares (sharers)." Assuming that the proviso, that the distribution of the villages shall not be affected by any increase or decrease in the stipulated revenue, is used generally with respect to all of the villages, and not with reference to the first forty-four, it does not by any means thence follow that the Government revenue upon Kabilpur was not even then a fixed amount. The proviso may have been made *ex majori cautela* by the parties to that agreement of partition, in contemplation of the notorious uncertainty of Native rule and Native policy, and of the frequent disturbances of the country. Again, the circumstance that Toli, (which was described in that document as an inam village, and is admitted to have been so, and was, therefore, not legally liable to enhancement of assessment) is included amongst those villages of the pargana to which the proviso is said to be applicable, shows that we should not be warranted in drawing from that proviso so strong an inference as that the parties, by making it, intended to admit that every village in the pargana was liable to enhancement of assessment. The safest construction of it, therefore, is that the parties stipulated that the enhancement of the assessment of such of the villages in that pargana, as were liable to such enhancement (of which there were many), should not affect the distribution made by that document between the parties to it.

The next exhibit in point of antiquity is No. 67. Upon it the appellants have argued that the assessment upon Kabilpur in the Samvat year 1725 (A.D. 1668-69) was Rs. 921-8 and not Rs. 1,174-4. We concur, however, with the District Judge in saying that,—“It would not be safe to hold that the sum of money, entered in it opposite to the name of Kabilpur, represents the whole assessment of that village.” Subsequent accounts lead us to think that, in addition to the sum named, the village was then, at least, liable to a Moghlai charge, which would have brought the assessment nearly up to what subsequent documents establish as the ordinary amount of land revenue paid to the

Native Government. This exhibit is also open to the remark that its heading induces the supposition that the object of the document was rather to show how the villages were distributed, than what revenue was actually levied from them for the Government, although to a certain extent the latter is disclosed.

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Exhibit No. 98 (dated Samvat 1748, A.D. 1691-92) records the assessment to which the several villages in the pargana of Supa were then subject. It specifies Kabilpur as liable to an assessment of Rs. 1,174-4 which is compounded of two sums, viz., Rs. 1,074-12 and Rs. 99-8, which latter sum is described as Moghlai (or Moghlai). Moghlai haks are of ancient date. They were portions of revenue retained by the Mogul Government (which preceded that of the Mahrattas) after all their other possessions had passed into other hands. They formerly belonged to the ancestors of the late Nawab of Surat. Mr. Elphinstone Robertson, in his very useful Glossary of Gujarati Revenue and Official Terms, published in 1865, says (p. 45) that these Moghlai haks have, for the most part, passed into the hands of mortgagees and purchasers, and are distinct from the chaauth levied by the Mahrattas. He adds that they were levied direct by the parties entitled from the villages up to A.D. 1842, when, on the objection of the revenue authorities, Government prohibited that system of levy, and thenceforth Moghlai would appear to have been levied, as part of the assessment by Government, and the payments were made to the Hakdars direct by Government from the Government treasuries. He also says that these haks are to be found in the Surat Collectorate alone. (See further, as to Moghlai haks, Wilson's Glossary, p. 345.) This Exhibit, No. 98, contains the earliest mention, amongst the documents in evidence, of the sum of Rs. 1,174-4 as the amount of the assessment, and is named a Dehbandhi Tarija (summary of village assessment), and is one of the records of Government. Upon it the plaintiffs strongly rely.

Exhibit 68 (Tarija) for Samvat 1781 (A.D. 1724-25), shows a total assessment on Kabilpur of Rs. 1,809-2. Of

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this sum, however, only Rs. 1,054 seem to have been collected, whereof Rs. 937 were received by Government and Rs. 117 appear under the head of "Ganim." Kesavlal (the principal witness for Government) says that the word Ganimai indicates the dues of the Mahratta Government, as Mughlai (or Moghlai) indicates those of the Mogul Government (b). But having regard to the ordinary proportions (shown in numerous Government records in this case) in which the Mahratta and Moghlai authorities received their respective dues, there is reason to suspect that in this year (A.D. 1724-25) the accountant inverted the proper positions of the Mahratta and Mogul dues, the proportions assigned in the accounts of these years being altogether anomalous. Again, the sum of Rs. 516-0-4 placed in the column (in the translation) headed 'Recoveries' wears much more the aspect of a remission of revenue (or Mafi) than of a recovery. This appears from an examination of the other columns. The amount of revenue collected, Rs. 1,054, added to the second balance, Rs. 238-14 (which we understand to mean the uncollected revenue payable to Government and still due) gives the first balance Rs. 1,292-14, which the figures already mentioned would indicate to be the whole amount of revenue receivable for Government. If this be so, this account has been prepared on a principle somewhat similar to that adopted by Mr. Shaw more than 120 years afterwards, viz., from A.D. 1848-49 to A.D. 1868-69. The Rs. 1,809-2 would in that case represent the whole assessable value, whereof Rs. 516-0-4 were remitted

(b) Ganimai (from Gauim)—Invasion, hostile irruption.

Ganim or Galim. The enemy, the public foe. Molesworth's Mar. and Eng. Dic.

Ghanim. An enemy, a plunderer. Forbes' Hind. and Eng. Dic.

Ghanim. Plunder, spoil, the acquisition of a thing without labour and trouble.

Ghanaim. Plunder, booty, spoil, prey (taken especially in a war with infidels). Johnson's Arabic, Persian and Eng. Dic.

"The Mogul rule was succeeded by that of the Mahrattas, who, whatever may have been their merits in their own country, were in Guzerat mere plunderers." Mr. Pedder. Bombay Gov. Records, No. CXIV., New Series, p. 9.

probably as *mafi* and Rs. 1,292-14 were receivable by Government, which exceeds the normal rate of Rs. 1,174-4 (c). However this may be, this account, which is in some respects

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(c) Our remark, as to the probability of the sum of Rs. 516-0-4 representing revenue remitted, is merely conjectural, and rests upon the following grounds:—The fourth column of figures in Exhibit 68, in which that sum appears opposite to Kabilpur, is headed with the word “Recoveries” in the translation furnished by the defendants (Government). The sixth column of the same translation is headed with the words “Amount of Revenue collected,” under which heading the sum opposite to the name of Kabilpur is Rs. 1,054. Those headings appearing to be similar in meaning, we referred to the vernacular document, or rather to two copies of it furnished by the defendants; one having been filed in this case and the other in the Visalpur case, the original account not having been filed in either. The heading of the fourth column of figures in both copies is a compound word, but in one is spelt differently from what it is in the other. In one the word is Wásal-chothvo; in the other copy it is Wásal-cháthvo. The Gujarati word Wásal (Wasil, Wasilat, Wusúl in Hindustani; Wasúl in Marathi), derived from the Arabic *Wasl*, when used simply as a revenue term ordinarily implies “revenue collected” and sometimes “revenue” alone. In the sense of “revenue collected” it is used as the heading of the sixth column of figures in both copies, and has been rightly rendered in the translation as “amount of revenue collected.” (See Molesworth’s Marathi and Eng. Dic., 2d ed., p. 738; Forbes’ Hind. and Eng. Dic. [Persian character] p. 772; Wilson’s Gloss., p. 536). The second portion of the compound word, whether it be “chothvo” or “cháthvo,” is not to be found in any of the dictionaries, but our interpreter is of opinion that it is probably a corruption of the Sanskrit word “Cáturtha,” a fourth (from Cátur, four) and allied to the Marathi “Chauth” (incorrectly, but commonly written “chouth”) or “chautha,” and the Gujarati word “choth,” all of which signify a fourth. If the compound word be Wásal-chothvo or Wásal-cháthvo, the correct translation of the heading of the fourth column would probably be “Revenue one-fourth” or “Revenue collected, one-fourth,” and would indicate a levy of chauth by the Mahrattas A.D. 1725 to the extent of Rs. 516-0-4, which sum is not, however, a fourth of the sum (Rs. 1,809-0-2) given in the third column of figures as the total amount of the assessment for that year, or of any other sum opposite to Kabilpur in Exhibit 68. But, further, the sixth column purporting to show the amount of revenue collected as Rs. 1,054, and the eighth column pointing out that a portion, at least, of that sum was a Mahratta levy under the name of Ganim, raised a doubt whether the fourth column was intended to show the revenue collected by the Mahrattas. And the difference in the spelling of the second portion of the compound word, forming its heading, leads us to think it probable that the vowels had, as is frequently the case, been omitted in the original, and inserted in the copies at the direction of the copyists. If it had been the right vowel, we should have the word “cháthvo, which, no more than “chothvo” or “chathvo,” is to be found

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 GOVERNMENT OF BOMBAY shows that Rs. 1,054 only (which is somewhat below the
 v. normal rate), were paid to the Government authorities in
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On a first glance at the printed summary of assessments and payments extending from A.D. 1668-69 to 1870-71. handed to us by the Advocate General at the commencement of the argument, several ostensible variations from the normal

in the dictionaries, but might be traced to "chhāt," a Gujarati and also Hindustani word (śūt in Marathi), meaning "remissions." On that hypothesis the compound word would mean "Revenue remissions," and the fourth column would not seem to be redundant or inconsistent with the sixth and eighth columns.

Assuming, however, that this conjecture is ill-founded, and that the fourth column was, as is quite possible, intended to show a levy of Mahratta chauth, we cannot attach any importance to Exhibit 68. The Christian year 1725 was a period of anarchy in Guzerat, and, therefore, furnishes no safe guide to the extent of the rightful or normal assessment. The Mussulmans and Mahrattas were not only in antagonism to each other, but were divided amongst themselves. Shujaet Khan (the Foujdar of Surat), as deputy of Sirbuland Khan, was at war with and was eventually defeated and slain by Hamid Khan, the deputy of Nizam Ool Moolk. Rustam Alikhan continued the contest with Hamid Khan. Pilaji Gaekwar at first aided one, and, eventually, the other of these combatants, and was himself, as lieutenant of the Senapati (then Trimback Rao Dhabarey), embroiled with Kantaji Cuddum Banday as officer of the Raja of Satara in levying the Mahratta chauth, which (together with the Sirdesmuki) was at first mere freebooting, and was not conceded as a right by Sirbuland Khan until A.D. 1729—a concession highly disapproved by the Court of Dehli, and for which Sirbuland Khan was superseded in his office. (Wallace: *The Gaekwar*, pp. 8, 9, 10, 15, 19.) Col. Wallace, speaking of the dispute between Pilaji Gaekwar and Kantaji, says: "For some time these dissensions only caused their demands to fall with heavier weight on the unfortunate towns and villages, &c. (p. 10.) The Sirdesmuki, granted in 1729, was ten per cent. of the whole revenue, both on the land and customs with the exception of the port of Surat and the district around it, and the chauth was one-fourth of the whole collections of the land and customs, excepting Surat, and five per cent. on the revenues of the city of Ahmedabad (*Ibid.*, p. 15).

Since the judgment in this case was delivered and the above was written, the Visalpur case has been argued before us, and we have, with the consent of counsel on both sides, procured from Surat the original of Exhibit 68 (numbered in the Visalpur case as Exhibit 49), and find that the heading of the fourth column is "Wāsal-Chothvo" and must be taken to indicate a levy of chauth by Mahrattas to the extent of Rs. 516-0-4 in Kabilpur in A.D. 1725.

rate of Rs. 1,174-4 appear. Mr. Birdwood, however, has completely succeeded in showing that the great majority of those variations is only apparent and not real. The addition of the Moghlai, which, though it may not appear in some of the accounts, does appear in many of them, and undoubtedly was leviable from a time anterior to the Mahratta Government, explains most of the variations. The difference of currencies, the deductions in respect of land taken for roads, the temporary charges for a talati, havildar and majmadar, and the Thanavari receipts, explain most of the other discrepancies quite satisfactorily. (Of these, the difference of currency, the deductions in respect of land taken for roads, and the Thanavari receipts, furnish the reason for the District Judge fixing the amount of land assessment at Rs. 1,089-13-1 Government currency.) The very few unexplained exceptions to the uniformity of the assessment, occurring, as they do, mostly in the early accounts, are merely such *paucæ maculæ* as to the fair and moderate rather help to prove the rule, and could suggest imperfection of title to none but the over-keen and astute in resumption, whose well-intentioned, but excessive zeal to advance the interests of the State really produces the opposite result. This case differs widely from the Kanara Land Revenue case.* There, previously to the British rule, the assessment was proved to have frequently varied, as much as 50 per cent. on one occasion alone having been added to the assessment and continued. Sir Thomas Munro, indeed, spoke of the land rent as fixed, but his own history of it showed that it was so only *sub modo*—that is to say, the variations were not so numerous or so serious as in some adjacent provinces, but they were very great and frequent in comparison with the exceptions in this case; and, moreover, were almost all in the direction of augmentation of land revenue, which, down to the fall of Tippoo Sultan in 1799, and the consequent inauguration of the British rule, was in a state of growth. Here, however, when there have been departures from the normal rate for Kabilpur, the variation has been more generally in the direction of diminution than in that of increase, the amount levied being in the

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* *Supra*, p. 1. *Vyakunta Bapuji v. Government of Bombay.*

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case of the very few unexplained variations more usually below than above the normal rate. It is a circumstance particularly worthy of note that while from year to year we find the total annual amount levied from the pargana of Supa ever fluctuating, and the assessment on its villages other than Kabilpur also fluctuating, the assessment on Kabilpur itself has been uniform. In speaking of the other villages we are not to be understood as including amongst them the few villages admitted to be vazifa, or the village of Toli (throughout described as ināmi), or the three villages beside Kabilpur in which the right of enhancement is in litigation, inasmuch as we are unwilling to say anything in the present suit with regard to those three villages. Excepting accordingly from our remarks those three villages and the vazifa villages and the villages of Toli and Tambarni, and taking, as instances, the Christian years A.D. 1754-55, 1764-65, 1765-66, 1767-68, and 1770-71, we find that villages other than Kabilpur have in those years varied much from year to year in assessment, and the total assessment on the pargana of Supa, in which they are situated, has also varied sometimes in the direction of increase, sometimes, otherwise, yet in Kabilpur it has been steady at Rs. 1,174-4 with the unimportant exception, in two of those years, of an additional rupee as present for a peon or chitnis, and a *primâ facie* exception in the year 1754-55, which disappears when the ordinary Moghlai (Rs. 199-8) is added to the sum (Rs. 974-12) mentioned in Exhibit No. 239 as received by Government.

We are unable to concur in the argument for the appellants that the introduction of a talati, havildar, and majmudar, in A.D. 1819-20, by the British Government was a variation of the assessment, or indicates a right to vary it. Previously to the introduction, although the cost of them does not appear upon the accounts, the village most probably had, and paid some such officers of its own. Moreover, the Government talati appears to have been, on the remonstrance of the Desais, removed in A.D. 1824 as improperly introduced (d). And at somewhat later periods the charges for

(d) See Exhibit 219, the petition of the Desais, and the order of Mr.

the havildar and majmudar disappeared from the accounts. 1875.

We now proceed to refer to the law as it affects this case. GOVERNMENT OF BOMBAY

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The portion of the preamble of Regulation XVII of 1827 of Mountstuart Elphinstone's Code, material to the question of the jurisdiction of the Civil Courts in matters of assessment, is that which recites, as one of the objects of the Regulation, "that the *titles* held to confer a *right*, except in times of exigency, to entire or partial exemption from the payment of revenue, should be declared, and a mode provided for trying the *title* to exemption enjoyed when such *title* is deemed insufficient by the revenue officers." This, it will presently be seen, is consistent with the purview, *i.e.*, the providing part or body of the regulation.

The first clause of the 2nd section of the same regulation enacted that :—

"All land, whether applied to agricultural or other purposes, shall be liable to the payment of land revenue to Government, according to the established principles which govern the assessment of that description of land to which it belongs, *except such as may be proved to be either wholly or partially exempt from the payment of land revenue*, under any of the provisions contained in Chapters IX. and X. of this Regulation."

Chapters IX. and X. (comprising Sections 35 to 51) of that Regulation having been repealed by Section 1 of Bombay Act VII. of 1863, the Advocate General argued that the clause of the Regulation, just quoted, must be now regarded as stopping at the word "belongs," and that the concluding exception is wholly repealed. But the Legislature of India has, in Act XII. of 1873, declared that the portion repealed consists of the words "under any of the provisions contained in Chapters IX. and X. of this Regulation"—so the clause quoted is still in force down to and including the words "payment of land revenue" where they occur for the second

Lumsden, the Collector, endorsed thereupon, directing the removal of the talati,

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time, and the exception now stands thus :—"except such as may be proved to be either wholly or partially exempt from the payment of land revenue." That declaration of the Legislature of India, made so recently as 1873, should be taken into consideration, were it necessary now to determine how far Regulation XVII. of 1827 is affected by Bombay Act I. of 1865.

The 2nd Clause of Section II. of Regulation XVII. of 1827 provided that nothing contained in the first clause of that section "shall be understood to affect the right of Government to assess to the public revenue all lands under whatever title they may be held whenever and so long as the exigencies of the State may render such assessment necessary."

Section IV. Clause 1 enacted that "*When there is no right on the part of the occupant in limitation of the right of Government to assess, the assessment shall be fixed at the discretion of the Collector, subject to the control of Government.*"

The special subjection of the *discretion* of the Collector to the control of Government, on the principle of the maxim *expressio unius est exclusio alterius*, precludes the construction that the Collector's *discretion* is subject to the control of the Civil Courts.

Section IV., Clause 2 of the same Regulation enacted that "*When there is a right on the part of the occupant in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, the assessment shall not exceed such specific limit.*"

This clause deals with 'rights,' not with 'discretion,' and contains no provision, either express or implied, that 'rights' are to be excluded from the consideration of the Civil Courts. That portion, therefore, of Clause 2 of Section IX. which gives a resort to the Civil Court, would operate upon questions of right arising out of a specific limit to the assessment.

Section IX., Clause 1, enacts that, "The Collector's decision upon any question arising out of the provisions of the

preceding sections shall, in the first instance, be obeyed and acted upon as the rule."

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The second clause of the same section is important. It enacted as follows:—"But if any person should deem himself aggrieved by any such decision, he may present to the Collector a petition, addressed to Government, praying for redress, or may file an action against the Collector in the Civil Court, under the ordinary rules, or he may pursue both methods at the same time."

"Third.—The Collector shall forward to Government, without delay, any petition presented to him under the preceding clause; but the reference to Government shall have no effect upon any suit instituted in the Civil Court."

The observations already made upon Clauses 1 and 2 of Section IV. show that, in order to give to those clauses, respectively, their full and just effect, the second clause of Section IX. must, in matters of assessment, be read distributively, or as it is called, *reddendo singula singulis*. Thus Government must be regarded, when a petition is presented to it by a person deeming himself aggrieved by a decision of the Collector, as having authority to deal with it as Government may please, the discretion of the Collector being in all respects subject to the control of Government.

But in the case of an action in the Civil Court, the latter can only interfere with regard to (*i. e.*, adjudicate upon) the legal right or title of the plaintiff to exemption or partial exemption from payment of land revenue, by reason of the existence of a specific limit to the assessment in the case. This construction at once harmonises all three clauses, without violating the provisions, express or implied, contained in any of them, and also attains the object set forth in the preamble.

Those two clauses of Section IV. are most important, when taken in connexion, as they must be, and, as we believe, they always have been, with the second clause of Section IX. as fixing a boundary beyond which the Civil Courts may not travel in questions of assessment of land revenue.

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We have, therefore, with much astonishment learned that, in a quarter which is entitled to better information, it has been stated that the discretion of the Collector is, in all matters of land assessment, subject to that of the Civil Courts—that there is not a single question which can arise in the course of a settlement, whether it relates to the fertility of soils, or the prices of produce, or any other matter, if any there be, even more impossible for a Court of Law to investigate, which may not be taken out of the skilled hands that can deal with it and carried before a tribunal that knows nothing about it. It has been also said that the Civil Judge may even control the broadest principles of an assessment; that he may disapprove of the portion of the assets which the Government think it right to take; that he may think that the assessment ought to be governed by prevailing rates of rent instead of the productiveness of the soil and the rates of prices, or he may think the contrary; that he may even decide that the exigencies of the State are not such as to warrant the imposition of such an assessment as the Collector has decided to impose; that in all these cases the decision of the revenue officer is expressly made disputable in a civil action; that, in short, the whole land revenue system of the country is, by this Regulation, made subject to the control of the Civil Courts.

With all due respect for the high quarter in which this view of the jurisdiction of the Civil Courts of this Presidency in its older provinces has been thus expressed, we must most emphatically state, as we have already stated, in the progress of this case, that the Civil Courts have not any such jurisdiction as has been thus ascribed to them; and that, so far as the Judges of this Court know, the Civil Courts have never asserted that they have or ever had any such jurisdiction. Nay, further, those Judges are not aware that, even in the wildest arguments of legal practitioners in those Courts, any such jurisdiction has been imputed to the civil tribunals.

Had such a jurisdiction existed, the Court would have been called on to exercise it in the Kanara case. It was

there argued that there was a specific limit of assessment—a maximum or *Kadim beriz*, as it was called, which Government could not exceed—and that, if Bombay Act I. of 1865 purported to authorize such an excess, it was for that purpose *ultra vires* and inoperative. It was not, however, so much as for one moment contended, by the learned and very able counsel for the plaintiffs, that, if he failed (as he did) on both of those points, the Court had any jurisdiction to interfere in the assessment, or discretion left to it by law with respect to the extent of the enhancement. Being of opinion, as my brother West and I were, that the Bombay Legislature had not, in that portion of Act I. of 1865 which affected the case, gone beyond its authority, and that neither by grant, sanad, lease, patta, or other contract, legislation (and this, as we shall presently show, includes prescription) or otherwise, was any specific limit to assessment established, and, therefore, that the power to enhance was vested in the Revenue Department, subject to the control of Government alone, we forebore not only from actually deciding as to the fairness of the augmentation of the assessment on the plaintiffs' lands, but even from expressing any opinion upon that question. We both thought and said that to interpose in the controversy which had arisen upon it would be a departure from our proper province and a usurpation of one of the functions of Government in its Revenue Department. We took that opportunity of disclaiming any such jurisdiction, in consequence of remarks made some time previously (e) in the same quarter as that already mentioned, but by a different speaker, which attributed to the Civil Courts an extent of authority which they never possessed, and, so far as we know, never claimed. The case, *Wamraji Sadasiv Thate v. The Collector of Ratnagiri and the Superintendent of the Revenue Survey* (which was treated as the text for those remarks), afforded no legitimate ground for attributing to the Civil Courts any such jurisdiction. The 25th Section of Bombay Act I. of 1865 requires that the assessment by the Survey Officer be “under such general and local

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(e) In August 1873.

1875. rules as may be in force in the survey under his charge." The plaintiff called two witnesses, one of whom was the kulkarni (i.e., the village accountant, and as such a Government revenue officer), and another inhabitant of the village, who was Plaintiff's co-parcener in the land, who both gave evidence on solemn affirmation that according to former practice, as well under the Peishwa's as the British Government, and according to the rule of the Survey Department in force in the locality in which the lands are situate, the amount of assessment imposable upon such lands could not exceed one-sixth of the gross annual produce, i.e., in other words that one-sixth of the gross annual produce was then by law (25th section of the Act itself) the specific limit of the assessment. They further said that the defendants had exceeded that limit. The High Court, in its judgment, observed, as the fact was, that "to meet this testimony the defendants, the Collector of Ratnágiri and the Revenue Survey Superintendent, have not condescended to give or produce any evidence whatever." It has been said that there was no such rule of the Revenue Survey as the kulkarni and the other witness deposed. Possibly this may have been so. If it were, the defendants ought to have called one or more witnesses to contradict the plaintiff's witnesses; and to the neglect to do so, and to no other cause, the decision adverse to the defendants would be due. In order to preclude the supposition that the decision would establish that, in other cases than that of the plaintiff, the alleged rule of the Survey would of necessity be accepted as a fact, the Court was careful to say that "the Court must, under circumstances such as those in which this case is brought before it, hold that the local rule of the Survey in progress in the district where these lands are situated, is that *dhara* lands should not be assessed for revenue exceeding one-sixth of their actual produce, and that, in violation of that local rule of the Survey, and, therefore, of Section 25 of Bombay Act I. of 1865, the defendants have assessed the plaintiff's land in a proportion greater than one-sixth of the annual produce." That decision proceeded on the uncontradicted testimony as to the local rule of the Survey, and on

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the express provision in the Act that the assessment shall be in accordance with such local rules, which are thus thereby prescribed as the specific limit of assessment. The Court, therefore, kept most strictly within its jurisdiction as laid down in Regulation XVII. of 1827. I may add that, the Ratnágiri case being a regular appeal, we would have been at liberty to take additional evidence if we thought fit so to do, and that in that view the Court asked the learned gentlemen who appeared for the defendants on the appeal whether they could even then produce the Survey rules, but they did not do so, and did not seem to have any certain instructions at that time whether or not there were any Survey rules. Assuming that there was such a Survey rule as was sworn to on behalf of the plaintiff, and that Government in its Revenue Department deemed it an impolitic rule, the Governor in Council might, on any day, have altered it, and substituted a new rule for it under Section 28 of the same Act (I. of 1865.) If there were not such a rule as was so sworn to, its non-existence might have been proved by even some subordinate in the Survey Department : so it is difficult to understand how any consternation could have been properly occasioned in the Revenue Department by the decision in the Ratnágiri case (r).

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(r) That neither that case, nor the case of *Gadre v. The Collector of Ratnágiri* was misunderstood by the Civil Courts in the Mofussil, is sufficiently shown in the judgment, given by Mr. Birdwood on the 15th July 1872 in the District Court of Ratnágiri, in *Ramchunder Bhikaji Bhawe v. The Commissioner of Survey and the Collector of Ratnágiri*. After referring to the two first-mentioned cases, he said :—"The question then remains whether the allegation, that the defendant omitted to measure a portion of the plaintiff's land on which an assessment had been fixed, is one which a Civil Court can inquire into. I think that such an allegation can only be inquired into when there is a further allegation that the assessment actually fixed is in excess of what can be legally levied." And again :—"It is only 'when' (in the language of Regulation XVII. of 1827, Section 4, Clause 2), 'there is a right on the part of the occupant in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, that an assessment in excess of such specific limit is illegal ; and also (as in the case of Govind Vinayek Gadre) an assessment is illegal when legal notice has not been given of an assessment.'" Being of opinion that the plaintiff had not established any right to a specific limit to the assessment, Mr. Birdwood dismissed the

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If the case of *Gadré v. Collector of Ratnágiri* (6 Bom. H. C. Rep. 101) decided by Tucker and Warden, JJ., be fairly examined, it will be seen that the principle on which it really turned, is this: that although the Collector may assess land prospectively, yet he may not assess it retrospectively, so as to alter the terms as to rent on which the tenant entered upon and cultivated the land for the passing year; or, in other words, to infringe upon the specific limit as to rent fixed by the contract on the faith of which he so entered and cultivated for that year. That decision was, therefore, not only perfectly just, but strictly within the bounds of the jurisdiction of the Civil Courts as we understand it to be laid down in Reg. XVII. of 1827, and the learned Judges manifestly had no intention to outstep those bounds. The case of the *Sub-Collector of Colúba v. G. M. Mehendale* (10 Bom. H. C. Rep. 216) was one in which the revenue officers there concerned attempted, in violation of the terms of certain kauls or leases under which the plaintiffs had expended capital in reclaiming land from the sea, to increase the assessment on the land so reclaimed. That, therefore, was the case of a specific limit by contract, and fell precisely within the circumscribed jurisdiction conferred upon Civil Courts by Reg. XVII. of 1827 as understood here.

We are inclined to the opinion that the jurisdiction should be regarded as thus circumscribed even independently of the 4th section of that Regulation. For we should be dis-

suit. And in a judgment given by him in the same Court, on the 3rd of April 1873, in *Wasudeo Damodhar Joovekur v. The Collector of Ratnágiri and the Survey and Settlement Commissioner*, he said:—"And, first, it is stated that the assessment is excessive. Such an objection can apparently be entertained by a Civil Court only when, in the language of Section 4 of Regulation XVII. of 1827, there is a right on the part of the occupant in limitation of the right of Government to assess, in consequence of a specific limit to assessment having been established and preserved. In such cases any assessment in excess of such limit is illegal and can be set aside by a Civil Court." Both of these decisions of Mr. Birdwood had appeared in the public prints as well as in pamphlet form, and were perfectly well known in this Presidency, before the over-statement made, no doubt, however, inadvertently, in August 1873, as to the extent of the jurisdiction of the Civil Courts.

posed to hold that Section IX. (which empowers a person deeming himself aggrieved by the decision of the Collector to file an action against the Collector in the Civil Court) does not authorise the Court to exercise any control over the Collector unless he transgress the law. That is the proper and well-understood sphere of action of Courts of Justice, and, unless a contrary intention be clearly indicated, the Legislature should not be regarded as intending to confer upon them any greater power. The preamble, which points out that the intention of the Legislature was to provide means for determining as to the title to exemption from payment of revenue when the revenue officers deem that title to be insufficient, is completely consistent with that view. The 9th section should, we think, be interpreted in that light. Neither in that section nor in any part of the Regulation is there, in our opinion, the faintest intimation of a desire on the part of the Legislature that the Civil Judges should be transformed into Revenue Commissioners, or Collectors of a superior grade. We should no more deem the Civil Courts entitled to arrogate to themselves the duties of those offices, than Lord Selborne, sitting in Chancery, did to assume functions assigned by Statute to a School Board (L. R. 9 Chan. App. 122) or Sir G. Jessel sitting in the Rolls Court, did to appropriate to himself functions conferred upon a Railway Clearing Committee (L. R. 20 Eq. 383). The Revenue Department, when acting within the bounds of the liberal discretion which the law entrusts to it, cannot be interfered with by the Civil Courts. It is only when it passes those bounds and violates the rights of property, or otherwise transgresses the law, that the Courts can interpose. Those who wish well to the preservation of British power and honour in the East, and whose field of view extends beyond the frontier of a department, will not desire that this limited and salutary power of interposition should be destroyed or impaired. We have no reason to believe that, as a body, the revenue branch of the Civil Service of this Presidency thinks differently. Moderation and discretion, combined with ability, are too general amongst its members to lead them to desire a departure in this re-

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spect from the wise and statesmanlike principles of Mount-stuart Elphinstone embodied in his Code of 1827 (g). India has yet to see the man who better understood what the circumstances of the various provinces of this Presidency and the temper of its people required. It is well known that it was his intention to extend, in the course of time, to the Deccan and South Mahratta Country, the right of resort to the Civil Courts which exists in the older provinces.

Continuing our remarks upon Regulation XVII. of 1827, we arrive at the 3rd clause of Section IV. which provided that "nothing contained in the last preceding clause shall be understood to affect the right of Government to institute by regulation at any time, when it may appear expedient, new and specific rules regarding assessment."

That clause, as well as the 2nd clause of Section II. of the same Regulations already quoted, were not indispensable to the preservation of the power of legislation. That would have remained in the Legislature if those clauses had never been penned. The object of them, no doubt, was to prevent any misapprehension on the part of the subject, and to warn him that, should it thereafter appear to Government, in its legislative capacity, that he did not bear his fair share of the expenses of the State, or that if the necessities of the State should demand a general increase of taxation, the provisions in that Regulation for his benefit would constitute no obstacle to such measures as Government in that capacity might deem proper. But neither of those clauses conferred nor could have been intended to confer, either upon the

(g) The jurisdiction of Civil Courts in this Presidency was regulated, not for the first time created, by the Code of 1827. That jurisdiction and its gradual territorial extension may be traced through Bombay Regulation III. of 1799, SS. 2, 7, 10; Bom. Reg. I. of 1800, SS. 2, 7, 9, 10; Bom. Reg. X. of 1800, S. 39; Bom. Reg. I. of 1804, S. 39; Bom. Reg. II. of 1808, S. 3; Bom. Reg. I. of 1809; Bom. Reg. III. of 1814, S. 5, Clause 2, and SS. 10, 16, 23; Bom. Reg. IV. of 1815, S. 5; Bom. Reg. VI. of 1817; Bom. Reg. III. of 1819; Bom. Reg. IV. of 1819, SS. 1, 2, 3, &c.; Bom. Reg. III. of 1820; Bom. Reg. V. of 1820, and Bom. Reg. I. of 1823, SS. 23, 25, 26. That jurisdiction rested on the same principles as those laid down by the Government of Lord Cornwallis in the memorable preambles to Bengal Regulations II. and III. of 1793. The enactments from 1819 to 1827 inclusive were passed by the Government of Mr. M. Elphinstone,

Civil Courts, authority to pronounce upon the necessity of such new measures, or, upon the Revenue Department, the right to increase the assessment beyond the specific limit assigned to it by contract, grant, enactment, or other lawful mode.

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In connexion with these Clauses 2 of Section II. and 3 of Section IV. (as interpreted in 10 Bom. H. C. Rep. 216), the Advocate General contended that the subsequent legislation contained in Bombay Act I. of 1865, Section 25 (to which we shall presently more fully advert), authorized Government, in its revenue executive capacity, to enhance the assessment on the village of Kabilpur. To that argument, however, for reasons about to be given, we are unable to yield our assent.

The 8th section of Regulation XVII. of 1827, Clause 1, enacted that "nothing contained in any of the preceding sections shall be understood to affect in any way the peculiarities of the tenure of the holders of the villages settling hereditarily and by right for the revenues of their villages in the gross, and thus possessing in some measure a proprietary right in the land of their villages; the said peculiarities shall be respected and preserved, whether they relate to the occupancy, disposal, and *assessment* of the lands of the village, the collection of the revenue, and the joint liability of the shareholders, or to the intermediate steps prescribed by the terms of the tenure, and by local usage, for the purpose of realising the revenue, in case of non-payment, without destroying the tenure." This clause is (as will presently be seen when we consider the tenure of the plaintiff) of considerable importance in the present case. The 2nd clause of the same section relates to failure to pay the revenue, but is not material here, inasmuch as there is not any allegation of failure to pay the Baudhi-jama (fixed revenue),—the only question being the right to enhance the assessment.

Bombay Act II. of 1863 (passed for carrying into effect the policy of the Governments of Lord Elphinstone and Sir George Clerk for the discontinuance of the operation of the

1875. Inám Commission, which had been placed upon a legal basis by Act XI. of 1852) applies only to the provinces which were subject to Act XI. of 1852, the Dekkan, and South Maharashtra Country, and is, therefore, inapplicable to this case.

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To Bombay Act VII. of 1863 (which is applicable to the older provinces of this Presidency to which Act XI. of 1852 did not apply) frequent reference has been made.

With regard to the 4th clause of the 2nd section of that Act, which clause excludes the jurisdiction of the Civil Courts in the case of disputes as to tenure between Government and the holders of lands held upon treaty, or granted, or held as Saranjam, or on similar political tenure, or for service, it has been admitted on both sides, before us and in the District Court, that the village of Kabilpur is not held upon any of those tenures. Sometimes, in the oral evidence, the terms "Jahagir" and "Jahagirdar" have been used, but these phrases are often used very loosely, and applied to proprietary lands not held on service, although, in their stricter sense, they are applicable only to service tenures. In some few of the documents in evidence, of dates subsequent to the year 1848, the terms "Saranjam" and "Saranjami," which also imply service tenure, occur, but no importance can be attached to them, inasmuch as neither party has, in argument, alleged that the village of Kabilpur was held as Jahagir or Saranjam, or on any other service tenure (*h*).

In the Kanara case, Mr. Justice West and one of the members of this Court gave, at some length, reasons for the opinion that, as well under the Hindu Law as under the Muhammadan Law, the rule *nullum tempus occurrit regi* prevailed in India up to the commencement of the British Government. The rule of the English Law is the same.

(*h*) The objection to the jurisdiction of the Civil Courts, contained in the 3rd para. of the written statement, already noticed in note (*a*), and in certain printed reports of Government Officers, subsequently mentioned in note (*i*), tend to show that this has not always been the view which has been taken as to the liability of the plaintiffs, their co-parceners and predecessors, to render service in respect of Kabilpur and the other villages in Supa, as to which the right to enhance the assessment is in dispute.

Its effect is this, that the rights of the Crown do not by mere non-user become abrogated. It is no doubt a maxim to be applied with caution, and with which other rules and maxims of law may perhaps at times be permitted to compete, and it has been in England, as well as here, qualified by express legislation.

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The right of the Crown to assess lands was, by Regulation I. of 1823, Section 3, Clause 2, placed under restriction, where, for more than sixty years, lands had been enjoyed (without deed or other writing) wholly or partially exempt from the payment of the public revenue, provided it was so enjoyed under some tenure recognised by the custom of the country, and more particularly under any of those specified in Appendix A to that Regulation. Clause 3 of the same section was as follows :—" But enjoyment of such exemption for 12 years antecedent to the date when the territory, in which the land is situated, came into the possession of the British Government, shall be considered as equivalent to enjoyment for sixty years, in terms of the preceding Clause." Section 4, Clause 1, was, as respected lands exempt (which would seem to mean wholly exempt) from payment of revenue for sixty years, similar to Section 3, Clause 2, without, however, the proviso as to enjoyment under a recognised tenure. That Regulation was repealed in 1827, but the foregoing provisions of it were embodied in Regulation XVII. of 1827, of which the 2nd clause of the 35th section was similar to the 2nd clause of Regulation I. of 1823, Section 3 ; the 3rd clause of the 35th section was similar to Regulation I. of 1823, Section 3, Clause 3, and the 36th section, Clause 1, was similar to Regulation I. of 1823, Section 4, Clause 1.

The two periods of prescription of sixty years, thus introduced into Regulation XVII. of 1827, were by Regulation VI. of 1833 reduced to thirty years.

It follow from those enactments that if, at any time during the interval of forty years between 1823 and 1863, (in which latter year the 9th Chapter of Regulation XVII. of 1827, including its 35th and 36th Sections, was repealed by

1875. **GOVERNMENT OF BOMBAY** v. **HARIBHA'I MONBHA'I** Bombay Act VII. of 1863,) the Collector of Surat had put the plaintiffs on proof of their title to partial exemption from payment of land revenue, they might, by proof of enjoyment of such exemption, under a tenure recognized by the custom of the country in which the land is situated, for twelve years antecedent to 1802 (when the territory became British), have successfully resisted any enhancement.

We must next seek the law of prescription (which limits the operation of the maxim *nullum tempus occurrit regi*) in Act VII. of 1863, Section 21, of the Bombay Legislature; that Act having repealed Reg. XVII. of 1827 Chapters IX. and X. and Reg. VI. of 1833.

That section (21) is as follows :—

“ Claims to exemption from payment of land revenue in virtue of prescription shall be admitted under the following circumstances :—

Clause 1st.—When land situated in districts ceded by or conquered from the Peishwa after 1803, is proved to have been held by any person, his heirs, or others, deriving right from him, wholly or partially exempt from payment of land revenue, under a tenure recognised by the custom of the country, for sixty years in succession next preceding the date of this Act, or *where land situated in any other district is proved to have been held in like manner for thirty years as aforesaid.*

Clause 2nd.—Provided, however, that whenever exemption has been enjoyed under a sunnud or other writing, no title by prescription shall be admitted unless the full period required under the last preceding clause shall have elapsed subsequent to the expiry of the title under the sunnud or writing aforesaid.

Clause 3rd.—And that in no case shall a title to prescription be admitted in respect to Government lands alienated since the British Government obtained possession of the country, and without its permission.

Clause 4th.—And further that the exemption during the periods of sixty and thirty years respectively, as detailed in

Clause 1 of this section, be proved to have been enjoyed in strict conformity with the conditions of the recognised tenure under which it is claimed."

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This section is clogged throughout with the provision as to recognised tenure.

Supa containing the village of Kabilpur having been ceded to the British Government on Dec. 31 1802 (*vide* Reg. II. of 1827, Appendix E, and Thomas' Treaties, pp. 513, 519), the latter portion of the first clause of that section, viz., that—"When land situated in any other district is proved to have been held in like manner" (*i.e.*, wholly or partially exempt from payment of land revenue, under a tenure recognised by the custom of the country) for thirty years, as aforesaid—"claims to exemption from payment of land revenue in virtue of prescription shall be admitted," is applicable to that village, if it have enjoyed a partial exemption for the period of thirty years in succession next preceding the date of the Act under a tenure recognised by the custom of the country. We are clearly of opinion, as already stated, that it has been enjoyed by the respondents and their predecessors in title at a fixed revenue much below the full assessable value of the village for a very much longer period than thirty years in succession next preceding the date of the Act. We shall next proceed to consider whether it has been held under a tenure recognised by the custom of the country.

The principal witness for the appellants, Kesavlal Nathabhai [see Exhibit No. 256], who is a Mámlatdár, and has officiated in that capacity for the pargana of Supa, distinctly admitted, and it is not in fact denied, that Kabilpur is not a rayutvari village, that is to say, it is admitted that the revenue settlement is not made with the cultivators (rayuts) individually. He says: "Kabilpur is a Hundavari village. The meaning of the words 'Khatabandi' and 'Hundabandi' is one and the same. The Government 'Dharo' or assessment is not taken from each field in Hundavari or Khatabandi villages, but 'Ulhad Dharo'

1875. (assessment in lump) is taken from the whole village. .
 GOVERNMENT OF BOMBAY According to my opinion such villages come under Sec. 8
 v. of Reg. XVII. of 1827." In his opinion that the village
 HARIBHA'I comes within Sec. 8 of Reg. XVII. of 1827, we concur.
 MONBHALL There was no annual settlement of the revenue payable by
 Kabilpur—the revenue was fixed (i) and was in no way de-
 pendent on the quantity of land in cultivation, and it was
 paid in the lump. Kesavlal's opinion is fully supported by

(i) In noticing, in the above passage, with reference to Section VIII. of Reg. XVII. of 1827, that the revenue payable to Government in respect of Kabilpur is fixed, we do not intend that it should be thence inferred that immutability of revenue is an essential characteristic of villages coming within the range of that section. In a large majority of such villages we have reason to believe that the revenue is not permanently fixed. In some few, however, as we shall presently show, it appears to be so fixed. The attribute which is indispensable to a village in order to its classification under that section, is that the shareholders, of the village should settle "hereditarily and by right for the revenue of their village," not individually, as in the rayutvari manner, but "in the gross," i.e., there must be a joint liability of the shareholders to Government for the revenue. And the same section peremptorily requires that the "peculiarities" of the tenure of villages, so held, must be "respected and preserved whether they relate to the occupancy, disposal, and assessment of the lands of the village, the collection of the revenue, and the joint liability of the shareholders, or to the intermediate steps prescribed by the terms of the tenure, and by local usage, for the purpose of realising the revenue, in case of non-payment without destroying the tenure." Hence it is not only a peculiarity in the mode of collecting the revenue of a particular village, falling within Section VIII. of Reg. XVII. of 1827, which is to be maintained, but also a peculiarity in its assessment. If, then, in such a village it happens to be a peculiarity that the assessment is invariable, and below the ordinary local rate of full assessment, that peculiarity must be respected and preserved. Such an invariability is, in other terms, partial exemption from payment of land revenue.

The principal villages falling within Section VIII. of Reg. XVII. of 1827 are those held on Bhagdari, Narvadari or such like tenure. The Bhagdari and Narvadari exist in Guzerat and are, in their leading features, similar—the term Narvadari being used in the Kaira and Ahmedabad Collectorate—and the term Bhagdari in that of Broach—(Robertson's Gloss. p. 42 pl. 7, 8, 9.) Some account of this tenure is given by Mr. Mountstuart Elphinstone in a minute written in April 1821 after a brief stay in Guzerat. That minute has suffered considerably in the hands of London printers. It is published in 3 Rev. Sel. pp. 661, 680. Amongst other errors of the press the word " Bhagdars " is misprinted " Baydars " ; and the villages are said to be " formed by strangers and never held ryotwar." The word

other parts of his evidence. He continues thus:—"All the sharers of the village were jointly responsible for paying Government money. They are not answerable according to their shares. Each sharer used to pay into the taluka treasury

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"strangers" is a misprint for "sharers"—which expression is used in contrast to "ryotwar." Captain Cruickshank, of the Superintending Survey in Guzerat in his report of the 10th October 1827, paras. 27, 28, has given a more detailed report of this tenure (See Robertson's Gloss. : p. 27, pl. 8 *et seq.*) He says (*inter alia*): "The lands of Narva villages are divided into certain large divisions (from 2 to 7,) called Bhags or Patees (Patis); and these are subdivided into smaller parcels (from 10 to 200), called Rupees, Annas, Paghrees or Pans; and these again into fractional parts. The superior Bhagdars, or holders of shares" (Bhag means a share or division) "are collectively responsible for all demands of public revenue; and the inferior Bhagdars are collectively responsible for that portion of the revenue which is assigned to their Bhags. The shares or divisions, both major and minor, are sometimes of equal amount, and sometimes of unequal, but always in a known and recognised proportion, so that the revenue due by the whole village may be exactly apportioned among them." Subsequently he says: "*The Narva is considered strictly as property; it is saleable from one person to another, and inherited, subject to all the rules and customs by which the inheritance of any other kind of property is guided. Sons inherit equally, and hence the almost incredible subdivisions of the Narva, but the holder of the minutest portion claims all the privileges of a Patidar, and takes his place in the village concerns before all other ordinary members of the community.*" And again:—"Under the Narva system the Government is supposed to have nothing to do directly with the land: it makes its demand in money, which is divided among the village community, and made good; and beyond an examination of the general state of the cultivation, Government has no right to interfere in any way with the division of the land among the cultivators, or to inquire how much or how little land is held by each individual. This is essentially and entirely the province of the village community." (See also 2 Bom. H. C. Rep. 231). The leading authority on the Bhagdari and Narvadari tenure is Mr. Pedder, to whose first and principal report on that subject we can, in this note, only cursorily refer. It is published in No. CXIV, New Series, of the printed Selections from the Bombay Government Records, and is dated March 21, 1862. Mr. Pedder was then Survey Settlement Officer in Guzerat, and it has not been disputed that in special knowledge of this subject as well as general ability as a Revenue Officer, his position is not second to that of any gentleman in the Revenue Department of this Presidency. He commences by describing his report as one "upon the different tenures in this province (Guzerat) which involve a joint responsibility for the payment of the Government Revenue, and the law relating to which is Section VIII. of Regulation XVII. of 1827." He then says:—"During this and last year I have taken much pains to make myself acquainted with the history and

1875. separate money for his own share, but, if one sharer failed to do so, all sharers were jointly answerable for it. Government did not make separate agreements with

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peculiarities of this system of tenure by personal inquiry from the ryots themselves and from the district and village officers, and by examining all official documents (English and Vernacular) which seemed likely to throw light upon a somewhat intricate subject. I hope, therefore, to be forgiven if I seem to speak with authority on questions regarding which experienced officers have held different opinions." After quoting a passage in a despatch of the Court of Directors upon Guzerat, dated in 1825 in which they remark that "the principal class of the people, the cultivators or ryots, have this in common with the same class in other parts of India: that they consist of two classes, one proprietary, one not proprietary; that among the proprietary class almost all the land is distributed; that they cannot be legally dispossessed of their lands, so long as they pay the Government demand, and that the population is divided into village communities," Mr. Pedder proceeds to speak of the two classes of village communities named by Sir G. Campbell as the aristocratic or simple form and the democratic. Of the aristocratic, Mr. Pedder says it was "a mer-aggregate of cultivators under a single headman appointed by the Raja. There was no common tenure of lands, but each man cultivated his own plot of ground, and his only proprietary right was a sort of customary one that he should not be turned out as long as he paid his rent, which he did directly to the Chief who owned the village, and the amount of which was nominally regulated by custom, but was often increased under various pretences." This was "the common form of the village communities west of the Gulf of Cambay and generally in the frontier districts of Guzerat where the country was divided among petty Chieftains." He next (para. 7 *et seq.*) treats of the second or democratic class of villages, which chiefly existed in the central districts of Guzerat—"the Dusknoores—the Cherotur or western portion of Kaira, the parganas of Broach and the Attavisi" of Surat. "Each village was originally founded by a family, or association of families of the cultivating castes—Rajputs, Kunbis, Boras, or Bhatelas, all apparently belonging to kindred tribes. After describing the constitution of such villages, and dividing the cultivators thereof into two bodies—the proprietary and the non-proprietary, and after indicating (in paras. 17 and 18) the effect of the various revenue systems of successive Governments upon these communities, he proceeded (in para. 19) thus: "The Mogul rule was succeeded by that of the Mahrattas, who, whatever may have been their merits in their own country, were in Guzerat mere plunderers. Their system was the ruinous one of farming out districts to speculators, who in their turn farmed out single villages to other persons, often unconnected with the village, but who were sometimes the patels or some influential cultivator. As the object of each farmer was simply to make as much money as he could during the few years of his lease, the villages were ruinously rack-rented. The *udhad jama* (lump assessment) of the village of Koo-budhal, for example, was raised in about forty years from Rs. 700 to Rs. 5,250

each sharer, but used to make one with all the sharers conjointly. This was done at the time of the first settlement. The time of the first settlement means the time the besides *toda giras*. This farming system was the pest of the communities, and created the Narva and Bhagdari tenures under report in the following manner. 20. In many villages, especially these in which the non-proprietary cultivators were numerous, the communities sooner or later broke down under the pressure. Every cultivator, proprietary or not, had to pay to the uttermost of his power, first, the old assessment of his land, and then a variety of cesses and other extortionate imposts, and thus any real distinction between the two classes disappeared. Many villages were deserted and never re-occupied by their original owners, and in many others the farmers altogether usurped the rights of the original proprietors. This was especially the case in the Surat Attavish, where the powerful Desai families contrived almost everywhere to oust the old Patels, and to divide parganas among themselves as their property. At the beginning of our rule these Surat Desais seem to have occupied precisely the same position as the Zamindars of Bengal. *Vide* minute by the Rt. Hon'ble Mr. Elphinstone, Rev. Sel., Vol. III., p. 699."

Of that minute written, in 1821, by Mr. Elphinstone, the portion which is here material is the commencement of the 7th para., which is as follows : — "The system of collection in the Surat District is now almost entirely rayutvar, but this improvement is very recently introduced. Before we got this district, and for a very long time after our acquisition of it, the country was completely in the hands of the Desais, who considered their possession so permanent that each family partitioned its parganas among its members, like the Patels of a Bhagdars' village. Every Desai managed his own bhag as he pleased, and in general they displaced the old Patels, and carried on even the interior management of each village by means of their own agents who were called Talukdars. - The Desai was thus the perfect master of the people without any one to check him. The mode of settlement of the revenue was for the Mamlatdar, and in our time, for the Collector, to send for the Desai and make as good a bargain as he could with him for the year's revenue of his pargana. The Desai then apportioned the sum to be paid among all the villages of the pargana, and the Talukdars (or, where there was one, the Patel) divided the assessment among the rayuts. By this plan the Collector made his assessment entirely in the dark ; and although it was his intention not to increase the revenue, unless where there was an increase in the cultivation, yet the want of information on his part, as well as the fraud of the Desai, often operated to raise the begoti of the old lauds. They, indeed, had no protection against the exactions of the Desai, if he chose to complain to the Collector, except an appeal to the Talati's accounts, by which his own ignorance of his rights rendered him little able to profit, and which could not be much relied on in consequence of the dependence of the Talati on the Desai." Mr. Elphinstone then described the new system introduced by the British whereby every rayut attended at the Komavisdar's Kutcherry, and his land and rent were ascertained

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1875. shares were first determined." After saying that, in some villages, this joint tenure had broken down in consequence of the insolvency of the sharers and of other reasons, he

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in his presence from the Talati's books, &c., &c. He observes (para. 8) that this new system was introduced in the year 1817-18, and there were several parganas to which it was only extended in 1820-21, and that, in some, it has not yet (1821) been completed. The probable and more obvious meaning of Mr. Elphinstone's remarks on the conduct of the Desais is that they levied from the rayuts larger sums as land revenue than they (the Desais) accounted for to the Native or subsequently to the British Government. It may be said that he further intended to imply that they improperly cast upon villages, in the parganas under their management, a portion of the burden of taxation which ought to have been borne by their own private villages situated in the same parganas. This, however, would not be consistent with his hypothesis that the Collector might not desire to increase the taxation of the pargana. If there were no such augmentation there could not be any such motive, as a desire to spare their own villages, to induce the Desais to increase the charge upon the rayuts. The first suggested meaning, namely, that the Desais embezzled a portion of the revenue levied and accordingly levied more than was necessary, is probably the true solution of what Mr. Elphinstone has written. Assuming, however, that, although he has not mentioned their private villages, he intended to include a charge against the Desais of fraudulently sparing their own villages and levying the deficiency thus occasioned from the other villages, it must be remembered that his observations are of a general character only and that he does not enter into details. If he intended to imply that the Desais, in order to save their private villages from augmentation of revenue in any particular year, distributed amongst the other villages in a pargana, managed by them, the whole amount of the increase and thus spared their own villages, it does not thence follow that in every such case the Desais acted improperly. Take, for instance, Toli, and the three Vazifa villages which are admitted to be partially exempt from payment of revenue, there would not, on the pargana of Supa being subjected in any particular year to an enhanced revenue, have been any impropriety in the Desais omitting to place any part of the increase upon Toli and the Vazifa villages, and distributing that increase amongst such other villages in the same pargana as were not exempt wholly or partially from the payment of land revenue. It still, therefore, notwithstanding Mr. Elphinstone's remark, would remain a question whether any particular village was wholly unassessable or liable to limited assessment only. We must recollect that, although the Desais might once, twice, or more frequently succeed in fraudulently exonerating from enhancement of revenue some one or more of their villages not entitled to total or partial exemption, such a course of evasion could scarcely endure without detection for any very long period of years. When the Mahratta raj became firmly established, the accounts were annually forwarded to Poona, the seat of the Peishwa's Government, whence many of them have been brought as evidence in this cause. The uniformity of the annual as-

proceeds:—"In the village of Kabilpur the first settlement had continued until the new survey was made" (viz., 1870-71).

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assessment of a particular village could not then have escaped notice. Supposing, however, that such might have been the case, and, therefore, that such uniformity during the Mahratta rule is not deserving of much weight, it cannot be said that the British Government, whose eyes were opened to the malversations, real or supposed, of the Desais so far back as 1817, as appears from Mr. Elphinstone's minute of 1821, and who had, therefore, to a large extent in Surat substituted the rayutvari system for that of the Desais, was from 1817 down to 1870 equally blind to that uniformity of assessment. Inquiries into their claim to hold Kabilpur at a fixed revenue were actually held in 1842 and again in 1855, but the revenue officers who held those inquiries did not venture to enhance the assessment. The revenue accounts, too, as constituted by Mr. Shaw, the Revenue Commissioner of Government, for the twenty-two years extending from A.D. 1848 to A.D. 1870 have, as already observed in the text of this judgment, contained annual admissions of the validity of the plaintiffs' claim to hold Kabilpur at a fixed yearly payment below the assessable value, and accordingly partially exempt from payment of land revenue. These are facts against which the learned counsel for the appellants (defendants) have in vain endeavoured, to struggle. Again there is really nothing to show that Mr. Elphinstone intended to apply his remarks to the pargana of Supa, or to the village of Kabilpur. There are, however, reasons which render it extremely improbable that he could have so intended. The Exhibit No. 32, put in evidence on behalf of Government, shows that the persons, under whom the plaintiffs derive their title, were in possession of many, if not all, of the villages in the pargana of Supa in Samvat 1714 (A.D. 1657-58), and amongst those villages was Kabilpur. This was anterior to the irruption of the Mahrattas into Guzerat, subsequently to which Mr. Pedder describes the encroachments of the Desais as having taken place. It is admitted that Kabilpur is the principal place of residence of the plaintiffs, and is cultivated by them. Even the Zamindars of Bengal, Bahar, and Orissa (to whom Mr. Pedder has compared the Desais of Surat) though before the permanent settlement in 1793 they may have been no more than farmers of revenue as regarded the greater part of their Zamindaris, yet occasionally were the owners of some part of the land within those Zamindaris.

The earliest recorded incursion into Guzerat of Sivaji, the founder of the Mahratta power, would seem to have been A.D. 1664, on the 5th of January, in which year he sacked the city of Surat. (See Elphinstone's History, 549, 4th edition; 1 Grant Duff, 145, Bombay reprint.) He seems to have made his first demand for chaauth and sirdesmuki in his negotiation through Jai Sing with the Emperor Aurangzib in A.D. 1665, and then only as against the Bijapur territory. Mr. Elphinstone says that the grant then made of the percentage (afterwards known as chaauth and sirdesmuki) on the revenue of each district under Bijapur

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He then speaks of "Bandhi-jama" villages. "Certain villages in Gujarat to which sanads have been granted by Government to the effect that no more assessment than what is fixed would be received, are called Bandhi-jama

"was the foundation of the ill-defined claims of the Marathas which afforded them such constant pretexts for encroachment on foreign territories in later times" (Elphinstone's Hist., p. 550 ; 1, Grant Duff, pp. 153, 154.) "His second invasion of Gujarat was A.D. 1670. Mr. Elphinstone says that Sivaji then again plundered Surat, carried his ravages over Khandesh, and for the first time levied the chauth, afterwards so celebrated in Maratha History." (Elphinstone's Hist., p. 555 ; 1, Grant Duff, pp. 179, 180). The chauth then levied would seem to have been in Khandesh only (1, Grant Duff, p. 181). In A.D. 1702, the Mahrattas again levied contributions in Surat, but their earliest probable levy of chauth in any part of Gujarat was A.D. 1705 (1, Grant Duff, p. 238 ; Wallace's Gaekwar, p. 1). As stated *supra*, in note (c), the right to levy chauth in Gujarat was not formally conceded until A.D. 1729. If we assume that "Wasal Chothvo," which is the heading of the fourth column of figures in Exhibit 68, means chauth, that exhibit, which is the summary of village accounts for A.D. 1724-25, is the earliest evidence in this case of a levy of chauth by the Mahrattas in the pargana of Supa. The same exhibit is also the first evidence of any levy of "Ganimai" by the Mahrattas. The date (A.D. 1657-58) of Exhibit 32, when compared with the dates which we have now given as those of the primary incursions of the Mahrattas into Gujarat, and of the ultimate establishment of their revenue demands in the same province, seems conclusively to establish that, howsoever applicable the observations of Mr. M. Elphinstone and Mr. Pedder, as to the acquisitions of the Desais during the Mahratta raj, may be to other villages, they are quite inapplicable to the villages in the pargana of Supa, including Kabilpur, mentioned in Exhibit 32, and which, at its date (A.D. 1657-58), were already in the full possession of the Desais, the progenitors of the plaintiffs. Exhibit 67 (dated A.D. 1668-69), which is anterior to any levy of chauth or ganimai in the pargana of Supa, also shows that the villages of that pargana mentioned in it, including Kabilpur, were then held by the Desais.

Reverting to Mr. Pedder's same report, para. 21, we find him saying : "But in many villages, especially in Broach and Kaira, the proprietary body succeeded in retaining the management of their villages, and in order to meet the new demands, founded neither on a definite share of the produce, nor on a fixed assessment of the land, but only regulated by the ability of the rayuts to pay, they invented the narva or bhagvari system, which was simply this : the joint responsibility for the payment of the Government demands was divided in the same manner as the lands of the community had originally been, and each proprietor was held answerable for a share of the revenue proportionate to his share of the proprietary right, the members of each family holding a separate estate, being in the first instance responsible for each other, and, finally the whole co-parcenary

villages. The amounts, which Government is entitled to receive from such villages, are credited as receipts other than those of Jama Bandi." Subsequently he says: "I cannot tell whether or not Kabilpur is a Bandhi jama village." Although this witness has spoken of sanads in connection with Bandhi jama villages, he subsequently

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being jointly answerable for the entire amount being paid." Further on in para. 28, clause 1, he says that "the Narvadars and Bhagdars are merely the old proprietary cultivators, and the system only a mode of sharing the Government demands;" and in Clause 3 of the same paragraph he says: "Wherever they have not been much over-assessed they have become wealthy. Their cultivation is by far the most careful and scientific in Guzerat; and the estimation in which they themselves hold their tenure is such that nearly all of them say they would prefer no revision of their assessment to having the tenure destroyed. A more convincing proof than any of the benefits of the tenure is that, under the Mahratta rule, narva land bore a saleable value." In paragraph 29 he says—"The number of villages held on the tenures under report is as follows:—

In Ahmedabad	...	1
„ Kaira	...	96
„ Broach	...	244
„ Surat	...	12 (the number in Surat is not certain).

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He adds that "although the principle is the same in all, yet almost every village has its own peculiarities, many of which will be found in the appendix to this report." In explaining some of the leading distinctions he makes in the same paragraph the following remarks which are very important in this case:—

"Regarding *hundabandi* (udhad-bandi) villages, as a few in Surat are called, there exists a difference of opinion, it being generally thought that in them there is no *joint* responsibility. This opinion seems to be founded on a passage in the Honourable M. Elphinstone's minute on Surat (Selections, Vol. III., page 698), that 'in some parganas the hunda tenure is originally formed by the division of a village in the same manner as is usual among Bhagdars, but there is no mutual responsibility, and the division once formed, the sharers hold exactly on the terms of the Khata-dars. In a few Surat villages called hundabandi, however, the assessment is made in the lump, and divided by a "phalnee" exactly as in narva villages (vide Appendix No. VIII.), and the joint responsibility is strictly enforced. I think M. Elphinstone did not refer to these villages, but to those others where the hereditary sharers of the proprietors were *separately* assessed on the hunda or khatabandi system." The example which Mr. Pedder gives in Appendix VIII. is the village Sesodra (or Sisodri) in the

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says :—" Bandhi jama villages are written or shown on the Tarija or gross revenue of the taluka. Such revenue statements are kept from the year 1849. The revenue of

taluka (pargana) of Supa, one of those mentioned in Exhibit 32 and many other exhibits in this cause. He says that its tenure is "hundabandi, exactly resembling the ordinary narva of Kaira." It is not one of those villages in which the plaintiffs allege that the assessment is invariable. We refer to it as elucidating the hundabandi tenure. Mr. Pedder says of this village :—

" There are four original distinct families of patidars, corresponding with the four mota bhags—one of bhattela desais—and three of mutia kunbis. To each family there is one mota bhagdar, who is also muttadar. If any sharer breaks, his nearest relatives must take up his land ; if they will not do so, the mota bhagdar of his family must manage the land, pay the corresponding share of assessment, and take the profit or bear the loss. This is the only peculiar privilege of the mota bhagdar ; in other respects all sharers have equal rights. If a mota bhagdar fails, the whole co-parcenary becomes responsible to Government for his arrears, or the tenure would be broken, but this has never occurred."

" The tenure was founded before the memory of man. From the introduction of British rule till Samvat 1907 the hundadars paid Rs. 6,000. In that year the jumma was raised to Rs. 7,800, at which sum a lease for 10 years was given them."

" The mota bhags were originally distinct, but now a few persons belonging to one family, by sale or private arrangement, hold shares in another mota bhag. No stranger, i.e., one not belonging to one of the four families, has been admitted to proprietary rights, nor has any hundabandi land been alienated to strangers, either by decree of Court, or by private arrangement. "Gubhan" land is attached to each mota bhag, but no decree has ever been passed upon such land."

" If a hundadar dies, leaving 3 sons, they all share his land, and become hundadars, but the name of the eldest son alone is entered. The daughter of a bhattela, in default of male heirs, may succeed her father, but not of a muttia."

Mr. Pedder's report recommended strongly the continuance of these tenures, and was highly approved by Mr. B. H. Ellis, (same volume CXIV., Bombay Government Records, pp. 62—65) by the Government of Bombay (*Ibid.*, p. 94,) and eventually by Sir Charles Wood, then Secretary of State for India (*Ibid.*, pp. 97, 98). Mr. Ellis (*inter alia*) referred to Bombay Act V. of 1862 as a proof that Government was pledged to maintain those tenures. That Act was settled in its present form by the writer of this note when, as Advocate General, an ex-officio Member of the Bombay Legislative Council. Regulation XVII. of 1827, Section VIII., was most properly referred to by Mr. Pedder as comprising those tenures.

the land paying less assessment, (*i.e.*, partially exempt from payment of revenue) will be found from the above-mentioned Tarijas as well as from the 'Number Kharda.' On

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That section and the description given of those tenures by Captain Cruickshank and Mr. Pedder, as well as the evidence of Kesavlal, the chief witness for Government, to the effect that Kabilpur is a hundabandi village for whose revenue payments to Government the plaintiffs and their co-proprietors are jointly responsible and have been so since the original settlement of the village, prove (whether or not that revenue be invariable in amount) that the denial in the answer, or written statement of the defendants, that the plaintiffs are the proprietors of that village, and the assertion that it is Government property, are unsustainable. It has, however, been shown at some length in the Kanara case that the existence of private property in the soil is not necessarily inconsistent with a right on the part of Government to increase the assessment, and, therefore, that the proof of proprietorship in the rayut is not, *per se*, proof of immutability of assessment—to establish which there must be something more than mere evidence of ownership of the land. We have already in the text of our judgment and of this note pointed out that there is satisfactory proof in the documentary and other evidence received in this cause of invariability in the assessment of Kabilpur. That evidence is strongly supported by a report of the 14th August 1865 of the Guzerat Vatan Commission, of which Mr. Pedder was President, addressed to Mr. Rogers as Revenue Commissioner. We refer to the copy of it printed for Government in 1866 at the Bombay Education Society's Press. It should be recollected that the object of that Commission was chiefly to ascertain how far the persons who were or were alleged to be under the obligation of rendering service to the State in respect of their landed estates in Guzerat were willing to render it, or to compromise by making a fixed annual payment to Government out of their lands in lieu of such service, or, as it is styled in the report, to agree to a non-service settlement. We limit ourselves to a brief notice of so much as is said in that report in relation to the Surat Desais, and especially to those of Supa. Much of what Mr. Pedder had said in his previous report of 1862 with respect to Desais of Surat Attavai is reiterated in this report of 1865 (see pp. 11, 12, 13, paragraphs 12, to 18). In reading that report the distinction should be borne in mind between villages in which the Desais had no legitimate interest beyond their Desagiri hak or percentage on the revenue, and villages which were their own private property. Speaking of the former, this report says (p. 12 para. 15) that "The authorised emolument of the Desais was cash allowance calculated at 2½ per cent. on the village revenues. This seems to have been the original remuneration of the office, and was formally confirmed by the Emperor Aurangzib in A. D. 1669. But in Surat, this limit was merely a nominal one, for all the profits, which the Desais could make from the village management, were, of course, their own." At page 8 it is stated that "the Surat Desais, with trifling exceptions, render no service whatever.

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a subsequent day he said—"Rs. 1,606 were entered as 'Mafi,' (i. e., remitted revenue) in the Kabilpur jama-bandhi from the year 1849 to the year 1868. They were entered in

The exceptions are the following :—certain Desais are appointed by the Collectors, Shaikdars or village inspectors. According to the original orders of (the British) Government, their hereditary shares in their vatans ought to be considered remuneration for this duty as well as the annual pay which they receive from the 'Sirpao Fund.' But the office and remuneration of a Shaikdar have long been looked on as purely stipendiary." The other exceptions do not relate to Supa. The tabular statement at page 6 shows that no portion whatever of the income of the Desais of Supa was applied in the support of officiating Desais, and that out of the whole of that pargana the officiating Majmudars received from the land only Rs. 9-4. And page 8 shows that, in the same pargana, the receipts of "rent of service land from inam and jagiri villages in Supa were, as regards Desais, nil, and as regards Majmudars Rs. 5 only. The report in p. 18, para 32, states that the Desais denied that their emoluments were held on service tenure, and that they were liable to be called on to perform district service or any service except that of heads of villages, and in pp. 15, 16 and paras. 26, 27 and its Appendix A, shows that, so far back as A.D. 1833, the Desais refused to permit any appropriation from their Desagiri to pay the Shaikdars, and that the contest terminated by the latter being paid out of the Sirpao Fund—of which some account is given in Appendix A (see pp. 31 to 34, paras. 12 to 22). It is a fund the title to which was in dispute between Government and the Desais. There is not any direct evidence that Shaikdars were employed in the village of Kabilpur. A composition for a fixed payment to Government of 3 annas in the rupee was offered by the Commissioners, but refused by the Desais of Surat, p. 10, paras. 7—9. The Commissioners in their report expressed their opinion to be that, although the Desais had not for many years rendered service, the right to demand it was only in abeyance (p. 16, para. 28). Before extracting the remarks in the Commissioner's report as to Kabilpur and five other villages, we should mention that it has been admitted that the village of Toli being an inam village and the villages of Vigam, Magad, and Narsirpur, being Vazifa villages, are partially exempt from payment of revenue. All of these villages are in Supa. As to Toli and five other villages, the Commissioners make in para. 47 the following observations :—

"There are six villages held by Desais under the name of 'Sirkari Udhad Jamabandi.' Five of these are in Supa, and one in Chikli Kusbo ; a fixed annual lump assessment is paid for these villages, which has not varied in amount since the introduction of British rule, and the right to hold them at this fixed amount is claimed as a Vatan emolument. The five Supa villages are the following, and a 'Nuksan' or loss to Government of the difference between the fixed and the full assessment has hitherto been shown for them in the accounts under the head of 'Inami Sarinjami' :—

the Tarijas, but I cannot say whether the land was Mafi or not. I have given this reply by the Collector's permission.

	Fixed-lump assessment.	Nuksan.	1875. GOVERNMENT OF BOMBAY v. HARIBHA'I MONBHA'I.
Jamalpur	Rs. 352	Rs. 649	
Vurwari (Virwadi) ...	,, 475	,, 851	
Vusulpore (Visalpur) ...	,, 28	,, 524	
Toli	,, 385	,, 1,628	
Kubirpore (Kabilpur) ...	,, 1,098	,, 1,606	
	Rs. 2,338	Rs. 5,088	

"For Chikli Kusbo, the lands comprised in each have never been assessed at Bigoti rates, no 'Nuksan' has hitherto been shown. The fixed lump assessment hitherto paid is Rs. 84-13-2, and the full assessment, as fixed last season by the Survey, is Rs. 636.

"48. The information to be obtained about these villages is of the most meagre kind; the Desais are unable to show any proofs whatever of any other title than prescription. A reference to the Poona Duftur, made some years ago, showed that Toli was held as an alienation during the rule of the Peshwa, and that the four Supa villages were entered as Khalsa. Regarding Chikli Kusbo, the Durbar of his Highness the Guicowar was referred to some years ago, and replied that the village was entered as Khalsa, while the district belonged to His Highness. But it is proved that the Desais had paid the same amount of fixed assessment for the Kusbo for several years previous to the introduction of British rule. The only information which we can find about these villages, upon the early records of the Surat Collector's office, is contained in a letter of Mr. Morrison to the Collector of Kaira, in 1820, in which, speaking of Desais' emoluments, he says 'some Desais hold entire villages, paying only a fixed salami annually to Government, but there are only six small villages of this description under Surat.' The five Supa villages and Chikli Kusbo are the only ones which can be referred to, and from this it would seem that Mr. Morrison considered them to be Vatan.

"49. We are of opinion that all six villages should be included among Vatan emoluments, and, whatever settlement may be decided on for the Vatan generally, applied to them also. As a Nuksan has hitherto been shown for the Supa villages, we have, pending the decision of Government, included it among the emoluments of the Desais in one statement, but have not done so for Chikli, as no Nuksan has hitherto been shown for it, and as the Revenue Commissioner, two or three years ago, ordered the village to be fully assessed at the introduction of the Survey, which Captain Prescott has done, and the Desais have appealed against."

With Chikli Kusbo the present suit is not in anywise concerned. The letter of Mr. Morrison, referred to in the Report, was dated 1st November 1820. It is given in Appendix A to the report, p. 29, para. 6. In the

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The Tarijas used to be kept or written by the Majmudar in the Supa Thana (Kacheri). The Desais were never required to write in the Thana."

printed copy the word "Salami" is in two places misprinted "salary." The term "salami" signifies a quit-rent.

In para. 35 of their report the Commissioners submitted, for the decision of Government, whether, as the Vatandars had refused either to serve or to compromise by paying three annas more of revenue in the rupee, Government would declare that the vatans should lapse (cease) on the deaths of the present holders.

Mr. Rogers, in his letter to Government dated 23rd November 1865, forwarding that report, in para. 7 *et seq.* (page 3 of the printed correspondence already mentioned) said—

"The settlement that should be carried out remains to be considered. That offered to the Surat Desais by the commission is a non-service settlement of three annas in the rupee, and to those of Broach, including Unklesur, 4½ annas, as already mentioned. Taking all of the circumstances into consideration, I think the offer is fair with regard to both divisions, and would not recommend the acceptance of any lower terms."

In para. 8 he continues thus :—

"The Desais having, however, declined to accede to this compromise, something must be done with a view to getting rid of the anomalous state of matters in Surat and to exacting efficient service in the districts of the sub-division and Unklesur. In the former the vatans are so much sub-divided as to preclude the possibility of efficient service being obtained in any one district, inasmuch as it is extremely improbable that the Civil Courts, to which an appeal would certainly be made, would recognize the authority of Government to throw together and consider as one vatan, with a view to employ a properly paid officiator, what are really sub-divisions of original larger vatans; precedents abound in the Surat Court under which each separately recorded sub-division would now be regarded as a separate vatan and be treated accordingly. Add to this the want of education on the part of the vatandars generally, and the other reasons adduced by the Commission in proof of the inexpediency of attempting any measure of the kind. There is, however, no alternative between enforcing service from each separate sub-division under the provisions of Act XI. of 1843 and the laying down of some such general rule as that proposed by the Commission in paragraph 35, viz., to declare that they shall all lapse on the death of the present holders. *This would, however, look so like a wholesale measure of confiscation that it would be better, in my opinion, to endeavour to carry out the other alternative, and exact some kind of service from every sub-division of a vatan, however small. This would probably prove sufficiently objectionable to induce the Vatandars to come round to the terms offered.*"

The Tarijas from 1848-49 to 1868-69 have been produced, and support this portion of the evidence of Kesavalal the Mámlatdár. They show the gross revenue of each year, and that it is composed of two portions, whereof one is the Bandhi-jama or portion which has uniformly been paid to Government, and the other is the Mafi or remitted portion retained by the Desais. The latter portion is called Nuksan or loss, *i.e.*, alienated by and, therefore, lost to Government. The Nuksan is, for every year from 1848-49 to 1868-69, stated to be Rs. 1,606. These Government records accordingly testify that the village of Kabilpur was then deemed to be partially alienated, and being so apparently without condition, it may, according to Robertson, be properly called inámi, a term sometimes very loosely used. The village is so called in some of the Tarijas of the period of which we are now treating. We have already observed that the phrase "Saranjami" (which also occurs in some of the same Tarijas) must, on the basis of non-liability to service, on which both parties have concurred in treating this village in this and the District Courts, be regarded as a misnomer. An unsuccessful attempt on behalf of the defendants (appellants) was made to induce the District Court to believe that the Tarijas, &c., from 1848-49 to 1868-69 were prepared by the Majmudar in fraudulent collusion with the Desais, and more especially so in showing the Mafi or Nuksan of Rs. 1,606, a bold conjecture unsup-

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The foregoing extracts from the report of the Guzerat Vatan Commission and of the Revenue Commissioner's letter have not been made for the purpose of deciding any question as to the liability of the Desais to service in respect of Kabilpur, but to show the view which the Guzerat Vatan Commission had taken as to the invariability of the assessment upon that village. As already observed, both parties, before the Court of First Instance and before this Court, have treated the village as not liable to service. We must, therefore, assume that it is not so liable, and we are thus relieved from considering what, on the opposite hypothesis, would be the legal consequences of the refusal of the Desais to render service. The evidence before the Guzerat Vatan Commission as to the invariability of the assessment was not so full or so strong as the evidence given in this cause to the same effect, yet that Commission, rightly as we think, came to the conclusion that the assessment was fixed.

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ported by any evidence whatever. What was termed fraud there has from the learned Advocate General in this Court received the milder appellation of probable mistake, or ignorance. We fail to discern either fraud, mistake, or ignorance in the exhibition of the Nuksan or in the use of the terms 'Bandhi-jama' or inámi. The new form of Tarija introduced in 1848-49 and showing greater details of account than were contained in the former Tarijas, was prepared in accordance, as Kesavlal the Mámlatdár states, with the orders of Mr. Shaw, then Revenue Commissioner. It is not pretended that there was any attempt on the part of the Majmudar to meddle with the amount of revenue (the Bandhi-jama) payable to Government. That amount, when the Majmudar's allowance of 15 annas and one pie, which had formerly appeared separately, is added to it, remained the same after as before 1848-49. The term 'Bandhi-jama' (fixed revenue) was shown, by the previous history of the payment which disclosed its uniformity, to denote most truly the nature of the tenure by which the village was enjoyed. It is not by any means a term or tenure novel to this Court. It occurred in many entries in number Khardas strongly relied upon in Regular Appeal No. 16 of 1873, *Lallu Harribhai v. the Collector of Surat* (decided 1st July 1873), on behalf of the Collector, and was then treated by him as a well-known tenure in his collectorate. But it is said that Kesavlal has testified that Kabilpur is a 'Hundawari or Khatawari' village, which names, he on a subsequent day said, would be more properly rendered 'Hundebandi or Khatabandi,' which latter terms he stated to be identical in meaning. On looking into Mr. Elphinstone Robertson's Glossary, p. 58, Art. 14, we find that Hunde and Hundo both mean the same as 'Udhad,' which, at p. 5, Art 11, is described as a "fixed sum paid to Government for land without reference to the number of bighas or value and description of cultivation," "Bandhi," used as a pre-

The reply of Kesavlal in his evidence that "the Desais were never required to write in the Thana" (kacheri) was evidently elicited for the purpose of showing that they had not an opportunity of tampering with the Government accounts.

fatory adjective, means fixed. "Udhad jamebandi" Robertson describes as "a fixed unalterable revenue settlement, either for a whole village or villages without reference to the extent or nature of the cultivation, and without any right on the part of Government to interfere in the internal management" (j). Kesavlal, speaking of Kabilpur, as already stated, said:—"Udhad Dharo" (assessment in lump) "is taken from the whole village." The Desais examined by Mr. Mulock (Assistant Collector) in 1869 (Exhibit 97) described Kabilpur as Bandhi-Jama and Udhad-Jama (see also Exhibits 78 and 105). Mugatraya Maniraya, who had been Mámlatdár of Supa in 1854-56 and 1861-63, who was examined as a witness for the plaintiffs, and Kuvarji Shankarji, who was examined as a witness for the defendants, described Kabilpur as a Bandhi-jama village. Even Kashi-

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The liability to service being eliminated from the case, it stands thus:—Kabilpur has been proved to be a hundabandi (udhadbandi) village, held in proprietorship hereditarily by the plaintiffs and their co-parceners. These holders are jointly responsible to Government for payment of the revenue, and are, in all material respects, identical with bhagdars and narvadars, and, therefore, within the scope of Section 8 of Regulation XVII. of 1827. - Kabilpur has further this special peculiarity, that its revenue payable to Government has been proved to be invariable, which, being a peculiarity of assessment, is by the same enactment required to be respected and preserved.

The order complained of in this suit is more stringent than the course deprecated by Mr. Rogers as savouring of wholesale confiscation. That course was a resumption of the partial exemption on the deaths of the incumbents, and rested on the intended justificatory basis of a supposed liability to serve and refusal to do so. The order complained of in this suit is not sought to be justified by any such liability to serve and refusal, and has resumed in the life-time of the present incumbents the right to partial exemption from revenue. The effort on behalf of the defendants, both here and in the District Court, has been to support that order on the ground that the plaintiffs and their fellow-parceners are ordinary khalas-tenants, the assessment of whose land may be enhanced at the pleasure of Government. The weight of evidence in the case is, in our opinion, quite inconsistent with any such theory.

(j) On consulting our translator, we are of opinion that Mr. Robertson should have written 'udhad-bandhi-jama' not 'udhad-jamabandi.' The quality of immutability of assessment, which he intended to express, is not implied in the latter form.

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nath Govindji, who appears to be the principal enemy of the plaintiffs, and to have assumed the position of an informer against them, speaks, so far back as the 25th June 1850, of Kabilpur as a Bandhi-jama village. Surbhai Shankerji (No. 43) a Desai and one of the sharers in Kabilpur, but who had refused to join his co-sharers in this suit, has been examined for the appellants (defendants), and, though saying that Kabilpur is a Government village, calls it a Bandhi-jama village. His evidence, as to its being a Government village, may have acquired its complexion to some extent from the circumstance that recently he has obtained the Patelship of Kabilpur and four other villages, and he has mortgaged his share in Kabilpur (*k*). It is admitted by counsel that the list of "tenures recognized by the custom of the country, specified in Appx. A. of Regulation I. of 1823 and repeated in Appx. A. of Regulation XVII. of 1827 in connexion with Clause 2 of the repealed Section 35 of that Regulation, is not exhaustive," and that admission is supported by the clauses of those Regulations to which those appendices belong.

Mr. Simpson, Collector of Surat in 1842, appears to have entered into some investigation of the plaintiffs' title to partial exemption from assessment, but what precisely was the nature of that proceeding does not appear beyond the fact that he did not alter the assessment.

Mr. Ravenscroft, when Acting Collector of Surat, on the 27th of February 1855 sent to the Desais of Kabilpur a regular notice (Exhibit 216) under Regulation XVII. of 1827, Sec. 40, in which he appears to us to have distinctly treated a holding under a Bandhi-jama as a recognised tenure according to the custom of the country. He recites that the Desais enjoyed "the village of Kabilpur as a Bandhi-jama and do not pay the full assessment," and he called upon them to defend their right to the Mafi (exemption)

(*k*) As to the hostility of mortgagors to the continuance of the Bhagdari and Narvadari tenure, notwithstanding the desire for and interest in that tenure of their coparceners, see Mr. Peddler's Report No. CXIV. Bombay Government Records, p. 19, para 35.

thus enjoyed, within two months after the receipt of the notice, otherwise their lands would be fully assessed. The Desais sent in a written defence, claiming Kabilpur as a Bandhi-jama, and relying on the antiquity of their title and upon Regulation VI. of 1833, which was then in force. On the 13th November 1856, Mr. Ravenscroft made a requisition (Exhibit 218) for more papers, and in that requisition again seems to have regarded a Bandhi-jama as a recognized tenure, and requires the Desais to defend their title to it. They complied with that requisition by sending in some papers in January 1857. No further steps appear to have been taken by Mr. Ravenscroft, notwithstanding Sec. 47 of Regulation XVII. of 1827, which, though since repealed, was then law. It provided that "Whenever the holder of land held wholly or partially exempt from assessment, or any person appearing to support his claim, has given a written answer to the Collector's notice, issued in conformity to Sec. 40, and, if the claim is founded on specific grant, has produced a written deed, or shown sufficient cause for not producing it, it shall not be competent to the Collector to leave the question undecided without the consent of the party in writing, on receiving which the Collector shall furnish him with a copy of the record of his proceeding, which shall contain an intimation that his title has not been decided upon, and is subject to future examination." Mr. Ravenscroft did not obtain the consent of the Desais in writing to leave the question undecided, nor did he make any compromise under Sec. 48. The defendants have not called him as a witness to explain why he did not proceed with the case. If he became as well acquainted with the facts as the District Court and this Court now are, however, we have no difficulty in understanding why an officer of his high sense of justice and reputation for discretion should abstain from advising any increase of the assessment upon Kabilpur. As we are deciding this case upon other grounds, we do not deem it necessary to say what was the precise legal effect of the abandonment in 1857 of the regular inquiry (commenced under Section 40 of that Regulation by Mr. Ravenscroft) when taken in

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1875. connexion with Section 47, which continued in force until
 GOVERNMENT 1863. We, therefore, do not give any opinion as to whether
 OF BOMBAY the subsequent inquiry and proceedings, which resulted in
 J. an enhancement of the assessment, were invalidated by
 HARIBHA'I Section 47 of Reg. XVII. of 1827. But we may say this
 MONBHA'I much, that the unexplained cessation of Mr. Ravenscroft's
 proceedings does not tell favourably on the case.

From 1857 to 1869 the plaintiffs seem to have been permitted to remain in peaceful enjoyment of their village of Kabilpur at its ancient assessment. In the latter year, Mr. Hope then being Collector of Surat, an inquiry was conducted by one of his assistants, which terminated in the order for the enhancement of the assessment on Kabilpur from Rs. 1,089-13-1 to Rs. 4,106-9. The village had been previously surveyed. The plaintiffs complained of the survey, and assert that Mr. Hope then informed them that the survey was being made with a view to making a vatan settlement with them; but that, instead of that being done, the full assessment of Rs. 4,106-9 was placed upon the village. The defendants' principal witness Kesavlal says that when Mr. Hope returned the answer to the plaintiffs as to a settlement, he, Mr. Hope, was under the impression that Kabilpur was held on service tenure.

The enhancement is sought to be justified by Bombay Act. I. of 1865, Section 25, which enacts that "It shall be lawful for an officer in charge of a survey to assess to the land revenue, under such general and local rules as may be in force in the survey under his charge, all lands cultivated, or uncultivated, and whether hitherto assessed or not, provided that such assessment shall not be levied for more than one year, until the sanction of the Governor in Council shall have been obtained thereto, and *provided that it shall not be leviable from any land held and entered in the Land Registers as wholly or partially exempt from payment of land revenue, except to such amount as is in accordance with previous practice, or any law which has been, or may hereafter be, enacted relating to lands so held.*"

Section 49 of the same Act enacts that :—

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“ The provisions of this Act shall not, except for the purpose of defining village boundaries, be applied to alienated villages : Provided that it shall be competent to the Governor in Council to extend, by notification in the *Government Gazette*, all or any of the provisions of this Act to every such village, on application made in writing by the holder thereof, and further, to apply the provisions of this Act to all Government lands situated in alienated villages.”

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“ Alienated village ” is defined in Sec. 2, Cl. *a.* ; but it is unnecessary to set forth that definition, as we do not consider it necessary to give an opinion as to whether or not Kabilpur, being only partially exempt from payment of land revenue, is an alienated village within that definition.

The 51st Sec. enacted that “ this Act shall be taken as part of Regulation XVII. of 1827,” but that Sec. was repealed by Sec. 20 of Bombay Act VI. of 1868.

A question might arise how far Sec. 25 of Bombay Act I. of 1865 controls Sec. 2, Clause 1 and Sec. 8 of Reg. XVII. of 1827, and Sec. 21 of Bombay Act VII. of 1863, but we see no necessity for now attempting to solve that question, inasmuch as we think that the village of Kabilpur falls within the concluding proviso of Sec. 25 of Bombay Act I. of 1865, which prohibits the levy of any assessment “ from land held and entered in the Land Registers as wholly or partially exempt from payment of land revenue, except to such amount as is in accordance with previous practice or any law which has been, or may hereafter be, enacted relating to lands so held.” There is not any definition of the term “ Land Registers ” in the Act. No separate Land Register for Kabilpur, such as appears to have been contemplated by Reg. XVI. of 1827, Sec. 22, seems to have been kept by Government. The Advocate General, however, with becoming candour, declined to argue that the Land Registers mentioned in Sec. 25 of Bombay Act I. of 1865 are only those named in Reg. XVI. of 1827. He said most justly that “ it would not be decent to contend that, where Govern-

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GOVERNMENT OF BOMBAY v. HARIHAR MONBHA'I, Sec. 22, the village books or other records may not be looked to on claims for total or partial exemption from payment of land revenue," but he argued that the entries of Kabilpur in the Government records from 1848 to 1868 as, to a certain extent, rent free, were not sufficient to bring it within the proviso in Sec. 25 of Bombay Act I. of 1865. But we think that these entries, taken with the previous entries from A.D. 1691-92 down to A.D. 1848 (showing, as we have already held, a uniform payment of a sum much below the full assessable value of the lands during that time) satisfy the exigency of the proviso in Sec. 25, and abundantly establish that Kabilpur is partially exempt from payment of land revenue.

In recapitulation, then, we hold—1st, that Kabilpur is an *Udhad bandhijama* village settled for hereditarily and of right by the plaintiffs and their co-parceners in the gross at a fixed immutable rent independent of the quantity of land under cultivation and payable to Government, and, as such, falls, in respect of the joint liability of the holders for the revenue in the gross, within Section 8 of Reg. XVII. of 1827. 2ndly, that the plaintiffs have succeeded in showing that the same village is land situated in a district ceded by the Peishwa before 1803, i.e., in 1802 to the British, held by the Plaintiffs and their predecessors in title partially exempt from payment of land revenue under a tenure recognised by the custom of the country for thirty years and upwards, and, therefore, falls within the claims for exemption mentioned in Clause 21 of Bombay Act VII. of 1863. And, lastly, that whether Section 2, Clause 1 and Section 8 of Reg. XVII. of 1827 and Section 21 of Bombay Act VII. 1863 are controlled or not by Bombay Act I. of 1865, the same village is liable to assessment to the extent of Rs. 1,089-13-1 only, inasmuch as it falls within the concluding proviso in Bombay Act I of 1865, saving from further assessment a village entered in the Land Register as partially exempt from payment of land revenue.

In conclusion we must hope that the facts of this case were not fully known to those members of the Revenue Department on whose advice the assessment on this village of Kabilpur has been nearly quadrupled. Such an absence of knowledge, however, would indicate a system of investigation so imperfect, perfunctory and one-sided as, if not liable to judicial supervision, must endanger the rights of property. Of that system we regret to say that this case would be no isolated instance. We are reluctant to think that the alternative hypothesis could be true—namely, that, notwithstanding an ample knowledge of the facts which have been so satisfactorily established in the District Court and here, there could have been so much indiscreet over-zeal for the revenue, as to induce any officer to manifest such a deliberate disregard for ancient vested rights as it would be painful to think could be possible under British rule. A recurrence of similar cases would go far to shake the belief of Her Majesty's subjects in this country in the permanence of any landed property whatsoever.

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Happily for the plaintiffs they had provided for them by Mountstuart Elphinstone and his colleagues, who, in this respect, walked in the footsteps of Lord Cornwallis, a Civil Court in which both parties and their witnesses might be fully and fairly heard, and the voluminous documentary evidence thoroughly and candidly scrutinised, and resumption, not to say confiscation, of a property of more than two centuries standing, (proved to have been held at a moderate fixed rent for about 180 years of that time, and which may have been so held for a much longer period) successfully resisted. To quadruple the rent, as the Revenue Department has attempted to do here, is virtually to confiscate the property.

It is too much to expect with any confidence that an *ex parte* proceeding in such a case as this can be satisfactory. The revenue officers, if unaided by hearing the facts fully debated by the professional advisers of the parties, and left to struggle alone through an enormous mass of documents and accounts, may err on either side. Here we find them

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erring on the side of high fiscal views. In the Kanara case, on the other hand, it was manifest that the opposition offered to the survey and assessment, and the consequent litigation, were, in a great measure, due to the sympathy of some of the Collectors having been excited in favour of the landholders, by imperfect investigations and erroneous views as to the authority and acts of Sir Thomas Munro. We are not for a moment to be understood as saying that those Collectors intentionally sought to raise that opposition or litigation, but their opinions, confidently expressed in reports to Government, were on record in their kutcheries, and information, contained in the archives of a Kutcherry or other public office in this country, has a singular facility in making its exit if there be any person interested in assisting it to do so. Consequently the views of those Collectors were well known throughout the province of Kanara. If the decision of the Kanara case had been left to those officers, or had it been based on their reports, the result would have been the opposite of what it was in Court.

The plaintiffs have established their case with a degree of clearness almost marvellous, when the length of time and of the accounts is considered. One volume of papers containing evidence of witnesses and documents consists of 358 pages. The other volume comprises 654 pages of accounts and papers, all of which have been translated. It could not be expected that, with the multifarious duties which press upon the members of Government, they could have found time to become acquainted with the contents of such a pile. We cannot, however, suppose that if a full and unbiassed investigation had been made, and the result properly laid before Government previously to the enhancement of the assessment in 1870-71, the plaintiffs would have been forced to incur the anxiety and expense of defending their ancient rights in a Court of Law.

We affirm the decree of the District Court with costs.

NOTE :—

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 50 of 1873.*THE GOVERNMENT OF BOMBAY..... (*original Defendant*) Appellant,

vs:

SUNDARJI SAVRA'M and others..... (*original Plaintiffs*) Respondents.*Assessment—Jurisdiction of Civil Courts in questions of assessment—**Regulation XVII. of 1827.*

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The jurisdiction of Civil Courts in questions of assessment, as that jurisdiction stood under Regulation XVII. of 1827, Chap. I, is confined to cases where the contention is that there is a right on the part of the occupant of the assessed land in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved.

THIS was an appeal from the decision of Baron Larpet, District Judge of Surat, in Original Suit No. 4 of 1872. The appeal was heard by Westropp, C.J., and Melvill, J.

The plaintiffs Sundarji Savram and twenty-seven others sued the Government of Bombay in the District Court of Surat, and prayed for a declaration that they were only liable to pay Rs. 28-4-4 as assessment on the *bhagdari* village of Visalpur, and not Rs. 1,155-11-9 as demanded by Government.

The District Judge (Baron Larpet) held that Visalpur was subject only to a fixed assessment of Rs. 28-4-4, and passed a decree for the plaintiffs. In appeal the High Court confirmed his decree. Its judgment (which turned principally upon facts) is printed at length in the file of Printed Judgments of 1879, at p. 333. Upon the question of the jurisdiction of the Civil Courts in matters of revenue, Westropp, C.J., said : “ The authority of the District Court to entertain the suit being admitted, all that we shall say upon the subject of jurisdiction of the Civil Courts to deal with questions of assessment is that, in accordance with the view which has ever heretofore prevailed in this Presidency with respect to Regulation XVII. of 1827, Chap. I, which was in force when this suit was instituted, and, therefore, governs it, we regard that jurisdiction as confined to cases where, as here, the contention is that ‘there is a right on the part of the occupant in limitation of the right of Government in consequence of a specific limit to assessment having been established and preserved.’ We adhere to what has been said on this subject in the Kanara case,⁽¹⁾ and in the Kabilpur case,⁽²⁾ and immediately afterwards acted upon in *Shaik Gulam Mohidin v. The Collector of Ahmedabad*.⁽³⁾”

1) *Vyakunta Bapuji v. The Government of Bombay*, *supra*, Appx., pp. 1—321 *et seq.*

(2) *The Government of Bombay v. Haribhai Monbhai*, *supra*, Appx., pp. 225—237 to 47.

(3) *Infra*, p. 276.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 43 of 1873.

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December 8, 9,
20, 21 and 23.

SHAIK GULA'M MOHIDIN (*Plaintiff*) *Appellant*,
vs.

THE COLLECTOR OF AHMEDABAD. (*Defendant*) *Respondent*.

Exemption from assessment—Tálukdári village—Wántá or rent-free lands
—*Summary Settlement—Bombay Act VII. of 1863—Tálukdári Settlement*
—*Bombay Act VI. of 1862—Right to hold Wántá lands free of assessment*
—*Jurisdiction.*

The lands in dispute, now forming part of the hamlets of Hirápúr or Rasulpur, originally formed part of the tálukdári village of Kuwar. About the year 1843 the tálukdár mortgaged the lands to P, and two years afterwards, in order pay off P, the tálukdár mortgaged the same lands to the plaintiff's father, and in or about 1858 gave him a deed of sale.

On the passing of the Tálukdári Settlement Act (Bombay Act VI. of 1862) the village of Kuwar was brought under its operation, and placed under Government management. While the village was under Government management, the Summary Settlement Act (Bombay Act VII. of 1863) was passed, and the Tálukdári Settlement Officer, acting apparently under section 3 of the Act, made an order directing the plaintiff to pay assessment to the extent of Rs. 2,000. Part of the lands held by the plaintiff were entered in the Government *khardás* as *wántá*. In a suit brought by the plaintiff to establish his right to hold all the lands rent-free, the District Judge held that the plaintiff had failed to prove that the lands were rent-free, and that he was liable to pay the assessment, and he, therefore, rejected the plaintiff's claim.

Held on appeal that the Government was bound by the statements in its own *khardás*, which admitted that part of the land was *wántá*, which must be regarded as meaning rent-free or tax-free land, and that it lay upon Government to prove that land so denominated was assessable, which it had failed to do; the plaintiff, therefore, as to so much of the land as was entered in the Government *khardás* as *wántá*, was entitled to hold it free of Government assessment. But as to the residue of the land in the hands of the plaintiff, and to which as against the tálukdár the plaintiff was entitled, the Court could not interfere with the rate of assessment fixed upon it by the Government. There not being any specific limit fixed by law, grant, *sanad*, contract, or otherwise, to the assessment of that residue for the purposes of land revenue, the Civil Courts had no jurisdiction to regulate such assessment, even if, having regard to the value of the land, it were excessive.

THE lands in dispute in this case, now forming part of the hamlets of Hirápúr or Rasulpur, originally formed part

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of the *tálukdári* village of Kuwar. About the year 1843 the *tálukdár* mortgaged the lands to one Pánáchand. Two years afterwards the *tálukdár*, in order to pay off Pánáchand, effected a mortgage of those lands with the plaintiff's father, and in or about 1858 gave him a deed of sale.

On the passing of the *Tálukdári Settlement Act* (No. VI. of 1862) by the Bombay Legislative Council the village of Kuwar was brought under its operation, and placed under Government management. While the village was under Government management the Summary Settlement Act (Bombay) No. VII. of 1863 was passed; and the *Tálukdári Settlement Officer*, acting apparently under Section 3 of the Act, made an order directing the plaintiff to pay assessment to the extent of Rs. 2,000. The plaintiff sought in this suit to establish his right to hold the lands rent-free. He alleged in his plaint that the lands in dispute had always been held as "*wántá nákrá*" or rent-free, and, consequently, that the Summary Settlement Act had no application. The defendant, the Collector of Ahmedabad, on behalf of the Government denied that the lands were "*wántá*" or rent-free; and contended that the Act had been properly applied.

The District Judge of Ahmedabad, after going through the oral and documentary evidence adduced on both sides, came to the conclusion that the plaintiff had failed to prove that the lands were rent-free, and that he was liable to pay the assessment fixed. He, therefore, made a decree rejecting the claim.

The plaintiff appealed.

The appeal was heard by Westropp, C. J., and Melvill, J. *Inverarity* and *Shántarám Náráyan* for the appellant the plaintiff.

Farran and *Dhirájlál Mathurádás*, Government Pleader, for the respondent, the defendant.

WESTROPP, C. J. :—The plaintiff has not, we think, established his claim to *wántá* land to the full extent of that claim, viz., 4,100 bighas. He rested it mainly upon the remarks as to *wántá* land, which accompany the report of

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Captain Cruikshank, (Exhibit No. 50,) in relation to his survey made in Samvat 1880 (A. D. 1822-23). But that survey was only for the purpose of ascertaining the boundaries of estates in their entirety, and not, in so far as it consisted of actual measurement, for the purpose of distinguishing the proportion in which *wántá* land stood to *talpád* land. Captain Cruikshank admits in his remarks that his information as to the extent of *wántá* land was derived from others, and could not be regarded as trustworthy. We agree, therefore, with the District Judge and Mr. Richey that the *khaddás* of early date are, so far as they relate to the extent of *wántá* land, deserving of more reliance than the report of Captain Cruikshank, resting, as it did in that particular, upon the allegations of the *tálukdárs* themselves, who were interested in representing the *wántá* land to be much greater in extent than it really was. We, however, think that Government is bound by the statements in its own *khaddás*, which admit that, in the present instance, 500 bighas of the land were *wántá*, and we find ourselves unable to act upon the general theory adopted by Mr. Richey that *wántá* land is assessable like other land. The proved acts of Mr. Fawcett, Mr. Blane and Mr. Rogers with respect to the *wántá* land in this case are incompatible with that view. We think that, in this case at all events, we must regard "*wántá*" as meaning what even Mr. Peile in his memorandum, in which he speculates upon the origin of *wántá* land, at page 52, para. 7, and page 57, para. 20 of No. CVI of the New Series of the Selections from the Records of the Bombay Government, admits that its name is (at least in Dholka, where the land of the plaintiff is situated) understood to imply, viz., rent-free or tax-free land, and in the last-mentioned paragraph he refers to this very land as tax-free and as alienated by the *tálukdár*. We are also of opinion that it lay upon Government to prove that land so situated and so denominated is assessable, which, in this instance, it has failed to do. Indeed, Mr. Peile (see paragraphs 21 and 25 of the same memorandum) would seem to have been of opinion that legislation would be

necessary to carry out his views in favour of assessment of *wántá* land held by a man who holds the residue of his estate on *tálukdári* tenure. Although, so far as respects the quantity of *wántá* land, we regard the early *khardás* as approaching more closely to the truth than the information given by the *tálukdár* or his people to Captain Cruikshank and recorded by him, we cannot hold the *khardás* to be absolutely correct. It is not contended that the quantities, either of *talpád* or of *wántá* land, as given in those *khardás* were arrived at by actual measurement. It would rather appear that those quantities were estimated by inspection without measurement. The extent of the whole estate, which was arrived at by Captain Cruikshank by actual measurement, has been admitted on both sides to be correct. It is 9,930 bighas, and shows how very inaccurate the estimate (howsoever made) in the *khardás* of the whole estate was, viz., 6,574 bighas. As it has not been contended that the revenue officers, in framing that latter estimate for the *khardás*, adopted different means from those used by them in calculating the extent of the *wántá* land at 500 bighas, we think that justice requires that we should hold that the deviation by them from the actual extent of *wántá* must be deemed to be proportionate to their admitted deviation from the actual extent of the whole estate, and, therefore, that as 6,574 bighas are to 9,930 bighas, so will be 500 bighas to the actual extent of *wántá* land—which proportion gives to us, for the last-mentioned quantity, 755½ bighas. As between the plaintiff and the Collector we, accordingly, hold that 755½ bighas of the land held by the plaintiff are *wántá* and unassessable. * As to the residue of the land which is in the hands of the plaintiff, and to which, as against the *tálukdár*, the plaintiff undoubtedly is entitled, we cannot interfere with the rate of assessment which Government has fixed upon it. There not being any specific limit fixed by law, grant, *sunad*, contract, or otherwise, to the assessment, for the purposes of land revenue, of that residue, the Civil Courts have not any jurisdiction to regulate such assessment, even if, having regard to the value of the land, it be excess-

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ive;⁽¹⁾ but we do not for a moment suppose that Government will sanction any vindictive assessment of that residue, because the Collector has failed in establishing the assessability of the *wántá* land.

The revenue officers, having manifestly assisted the *tálukdár* against his rightful vendee, the plaintiff, the Collector (Government) must pay to the plaintiff his costs. If there were any fraud in the suggestions made to Captain Cruikshank as to the extent of the *wántá*, such fraud was that of the *tálukdár* or his people, and not that of the plaintiff, who subsequently became a mortgagee and eventually a vendee.

We reverse the decree of the District Judge, and declare that the plaintiff is entitled to hold 755½ bighas of the land in the plaint mentioned and in the plaintiff's possession under Exhibit 18 (the mortgage-deed dated 15th February 1845) and Exhibit 19 (the conveyance dated 9th May 1858) as *wántá* land—that is to say, as free of Government assessment; and further declare that the residue of the said land in the plaint mentioned, and in the possession of the plaintiff under and by virtue of the said Exhibits Nos. 18 and 19, is liable to Government assessment. The said 755½ bighas of *wántá* land in the plaintiff's possession, and which he is entitled to hold free of Government assessment, are delineated upon the plan annexed to this decree and are coloured green. The said residue of the land in the plaintiff's possession, and which is, as aforesaid, liable to Government assessment, is coloured red. The defendant is hereby directed to pay to the plaintiff his full costs of the suit and of this appeal.

Decree reversed.

(1) See *Vyakunta Bapuji v. The Government of Bombay*, *supra*, Appx. p. 1, and *The Government of Bombay v. Haribhai Monbhai*, *supra*, Appx. p. 225.

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—VI OF 1862 (BOMBAY).	
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—SEC. 21.	
<i>See</i> LAND REVENUE	... Appx. 1, 225
—XX OF 1864.	
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—I OF 1865 (BOMBAY), SECS. 25 & 49.	
<i>See</i> LAND REVENUE	... Appx. 1, 225
—II OF 1865 (BOMBAY), SEC. 240— <i>Ejectment—Limitation</i>	
— <i>Acquisition of land for public purposes—Compensation—Mesne profits.</i>] Bombay Act II of 1865, sec. 240, does not apply to suits in the nature of an action of ejectment.	
Acts relating to the acquisition of lands for public purposes must be construed strictly in favour of the subject.	
The Court will not oblige the plaintiff in a suit in the nature of an action of ejectment to accept compensation.	
<i>Quære</i> —Whether a claim to recover the mesne profits of land for which the plaintiff sues in ejectment, comes within the provisions of Bombay Act II of 1865, sec. 240.	
SORABJI NASARVA'NI DUNDAS <i>v.</i> THE JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY	... 250

ACT III OF 1865 (BOMBAY).]	Bombay Act III of 1865 has not a retrospective force, and, therefore, applies neither to agreements collateral to wagering contracts entered into prior to its coming into operation, nor to interest subsequently accruing due on such agreements.	
	Where the parties to an agreement (prior to the coming into force of Bombay Act III of 1865), collateral to a wagering transaction, stand to each other in the relationship of partners, and not merely of principal and agent, they are severally liable for contributions, proportionate to their several shares, towards the losses incurred by the partnership in respect of such wagering transaction.	
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—SCH. II, ARTS. 63, 84, & 93.		
	See LIMITATION ...	238
—III OF 1872 (BOMBAY)—Town duty—Spirits—Toddy.]	Toddy-juice, whether in a fermented or unfermented state, is not "spirits" within the meaning of Bombay Act III of 1872, and is, therefore, not liable, on importation into Bombay, to a town duty of As. 4 per gallon imposed on spirits by Schedule B of that Act.	
	HORMASI KARSETJI v. W. G. PEDDER ...	199
—X OF 1872, SECS. 273 & 453.		
	See CRIMINAL PROCEDURE CODE ...	147
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—X OF 1875, SECS. 115, 147.		
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ADOPTION OF ELDEST OR ONLY SON OR SISTER'S SON—	<i>Gift in adoption by widow—Assent of husband when implied—Adoption among Brahmans and Sudras—Disqualification for adoption—Marriage—Chidakarana and Upanayana ceremonies—A dvayāmushyayana son.]</i> In Western India an adoption among the Sudras is not invalid, although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and, therefore, not a <i>sugotra</i> (i.e., of the same family) with the adopter.	

Even among Brahmans marriage does not disqualify for adoption.

Quære—Whether the adoption of an *asagotra* married man belonging to any of the three regenerate classes would be invalid.

According to Hindu law, a second adoption is invalid while the first adopted son exists and retains his character of a son.

Among Brahmans the adoption of a son for whom the *chūdakarana* and *upanayana* ceremonies have been performed in his natural family is not on that ground invalid. He notwithstanding acquires the legal *status* of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, their re-performance and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family.

A gift, by a Hindu widow, of her deceased husband's only son is invalid in the absence of an express authority conferred upon her by him during his life-time. Such an adoption, being null and void *ab initio*, cannot be supported by the maxim *quod fieri non debuit factum valet*.

Quære—Whether a gift in adoption of an only son by his father is void in the Presidency of Bombay.

In the Presidency of Bombay a widow may give in adoption a younger son where her husband has not, by direct prohibition or otherwise, indicated his unwillingness that she should, after his death, give such younger son in adoption, the husband's assent to such a gift being implied. But it cannot be implied to the gift by his widow, after his death, of an eldest and still less of an only son in adoption where he did not expressly indicate such assent in his life-time.

Semble—Where a father gives his only son in adoption as a *dwyāmushyayana*, he consents to deprive himself of one-half of the spiritual benefits derivable from the performance of religious obsequies. Hence his consent cannot be implied even to such a gift when made by his widow after his death. To such a case the *factum-valet* principle is wholly inapplicable, because the adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*.

The maxim *quod fieri non debuit factum valet* considered, and its application pointed out.

There can be no gift where there is an absence of authority, the attempt to give being a mere nullity. There is nothing in such an attempted transaction to set aside; it should simply be declared null and void *ab initio*.

There is no authority for drawing any distinction between Sudras and the other classes on the question of the legality of the adoption of an eldest or an only son.

Mhalsabdi v. Vithoba (7 Bom. H. C. Rep., Appx., p. xxvi) dissented from so far as it supported the gift in adoption, by a widow, of an only son without the authority of her husband.

LAKSHMA'PPA' v. RA'MA'VA 364

ADVERSE POSSESSION—Mortgage—Redemption.

See LIMITATION 180

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ANCESTRAL PROPERTY, ALIENATION OF, BY HINDU WIDOW AS MANAGER— <i>Inheritance of grandson's widow in preference to son's widow—Maintenance.</i>] Aliena- tions for family purposes of the ancestral estate by a Hindu widow (the mother of a minor son), though she was not appointed an administratrix under Act XX of 1864, upheld as made by a <i>de facto</i> manager. A Hindu died, leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently his grandson died, a minor, leaving his widow (also a minor) him surviving : <i>Held</i> that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property.	
BA'I AMBIT v. BA'I MA'NIK ...	79
APPEAL— <i>Practice.</i>] A point not raised in the Courts below was disallowed as being too late when raised in special appeal for the first time. RA'MA'BA'I SA'HEB PATVARDHAN v. APPA' ...	13
——— <i>Point raised on appeal not taken in the Court below—Civil Procedure Code (Act VIII of 1859), Secs. 351 & 353.</i>] The Appellate Court will not remand a case for re-trial on a point not raised in the Court below, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondents' costs of appeal.	
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———FROM ORDER— <i>Practice—Order made by Commissioner for taking Accounts—Civil Procedure Code (Act VIII of 1859), Sec. 363.</i>] The question whether or not an order is appealable is one for the decision of the Court. An order passed in a suit referring it to the Commissioner to take the accounts between the parties, is a decree. An order passed on a certificate given (under Rule 371 of the Equity Rules of the Supreme Court) by the Commissioner, subsequently to the order of reference, is appealable.	
HIRJI JINA v. NA'RRAN MULJI ...	129
———CRIMINAL— <i>Aggregate sentence—Criminal Procedure Code (Act X of 1872), Secs. 273 & 453.</i>] For purposes of appeal the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence. <i>Semble</i> , that where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed.	

But, if a separate sentence be passed on each head, held that an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial, within the jurisdiction of the Appellate Court.

REG. *v.* GULAM ABAS ... 147

APPEAL—Practice—Registration—Certificate of sale registered after decree but before appeal.] The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale certificate dated 20th September 1865. The first Court decided against the plaintiff on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875 the plaintiff filed an appeal in the High Court against that decree, and on the 26th July 1875 applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related.

Held by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it, or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree.

Quære—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate.

Quære—Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing.

LA'L BHAI LAKHMIDA'S *v.* NAVAL MIR KAMA'LUDIN
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APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL ... 8

ASSESSMENT, JURISDICTION OF CIVIL COURTS IN QUESTIONS OF.

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EXEMPTION FROM—*Talukdāri* village—

Wāntā or rent-free lands—Summary Settlement—Bombay Act VII of 1863—*Talukdāri* Settlement—Bombay Act VI of 1862—Right to hold *Wāntā* lands free of assessment—Jurisdiction.] The lands in dispute, now forming part of the hamlets of Hirāpur or Rasalpur, originally formed part of the *talukdāri* village of Kuwar. About the year 1843 the *talukdār* mortgaged the lands to P, and two years afterwards, in order to pay off P, the *talukdār* mortgaged the same lands to the plaintiff's father, and in or about 1858 gave him a deed of sale.

On the passing of the *Talukdāri* Settlement Act (Bombay Act VI 1862) the village of Kuwar was brought

under its operation, and placed under Government management. While the village was under Government management, the Summary Settlement Act (Bombay Act VII of 1863) was passed, and the Talukdārī Settlement Officer, acting apparently under section 3 of the Act, made an order directing the plaintiff to pay assessment to the extent of Rs. 2,000. Part of the lands held by the plaintiff were entered in the Government *khardās* as *wantā*. In a suit brought by the plaintiff to establish his right to hold all the lands rent-free, the District Judge held that the plaintiff had failed to prove that the lands were rent-free, and that he was liable to pay the assessment, and he, therefore, rejected the plaintiff's claim.

Held on appeal that the Government was bound by the statements in its own *khardās*, which admitted that part of the land was *wantā*, which must be regarded as meaning rent-free or tax-free land, and that it lay upon Government to prove that land so denominated was assessable, which it had failed to do. The plaintiff, therefore, as to so much of the land as was entered in the Government *khardās* as *wantā*, was entitled to hold it free of Government assessment. But as to the residue of the land in the hands of the plaintiff, and to which, as against the talukdār, the plaintiff was entitled, the Court could not interfere with the rate of assessment fixed upon it by the Government. There not being any specific limit fixed by law, grant, *sanad*, contract or otherwise, to the assessment of that residue for the purposes of land revenue, the Civil Courts had no jurisdiction to regulate such assessment, even if, having regard to the value of the land, it were excessive.

SHAIK GULAM MOHIDIN v. THE COLLECTOR OF AHMED-
ABAD Appx. 276

ATTORNEY AND CLIENT—*Vendor and purchaser—Constructive notice—Secrecy—Practice—Costs.*] The Court will not presume notice to have been given to his client by an attorney where such notice would involve a confession, by the attorney, of a fraud practised by himself.

The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction, with constructive notice of which he seeks to affect a purchaser.

Where the respondent had been guilty of such secrecy, the Appellate Court gave the appellant his costs in both Courts.

HORMASJI TEMULJI v. MA'NKUVARBA'I 262

BARGAIN PAPER.

See REGISTRATION 175

CAUSE OF ACTION—*Hundi—Consideration—Usage of shroffs—Jurisdiction.*] Where a *hundi* had been drawn out of Bombay upon a person in Bombay, indorsed and delivered, out of Bombay, to one who, out of Bombay, indorsed the same and sent it to a person who, in Bombay, received it, got it accepted and presented it for payment to the drawee, by whom, in Bombay, it was dishonoured:

Held that the dishonour of the *hundi* by the drawer in Bombay was a material part of the cause of action by the

Bombay holder against the first indorser, and, consequently, that such material part of the cause of action having arisen in Bombay, and the holder having obtained leave to bring his suit under Clause XII of the Letters Patent, 1865, the Court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable.

Held that, as between the plaintiff and the Ajmir constituent, the plaintiff, upon such credit in account being given, became a holder for value.

Held, also, that on the *hundi* being dishonoured at the due date by the drawee, the plaintiff was justified by the usage of *shroffs* in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value.

Held, also, that, as between the Ajmir constituent and the first indorser (the defendant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

SUGANCHAND SHIVDA'S *v.* MULCHAND JOHA'RIMAL ... 113

CERTIFICATE OF SALE.

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CIVIL PROCEDURE CODE (ACT VIII OF 1859), SEC. 7—

Suit for partition—Omission of a mortgaged field from claim—Subsequent suit—Limitation—Separation in living and separation by partition.] In 1861 the plaintiff brought a general partition suit (No. 1363) to recover his share of the family property in the possession of the first defendant, and did not include in that claim a field then in the possession of a mortgagee. The field was subsequently redeemed by the first defendant, who again mortgaged it to the second defendant. The plaintiff then filed the present suit to recover his share in the field. The first Court allowed the plaintiff's claim; but the District Judge, in appeal, threw it out, on the ground that it was barred both by section 7 of the Civil Procedure Code and by the law of Limitation. The Judge based the latter finding on certain allegations made by the plaintiff in Suit No. 1363, and in another suit brought by him against the first defendant and the then mortgagee of the field, from which allegations the Judge inferred a separation between the plaintiff and the first defendant:

Held in special appeal that the claim was not barred by section 7 of the Civil Procedure Code, because the mortgaged field was not available for an actual partition at the time of the former suit, No. 1363 of 1861. *Held*, also, that the suit was barred by limitation, because the possession

of the first defendant, or of his mortgagee, was not adverse to plaintiff, the alleged separation being only a separation in living, as distinguished from a separation by partition.

The true question for consideration in cases of this kind is whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second; and where the former suit is one for an actual division of property, the plaintiff is not bound in it to ask for a declaration defining his right in property not then capable of division.

NA'RAYAN BA'BAJI DA'BHOLKAR v. PA'NDURANG RA'MCHAN-
DRA DA'BHOLKAR ... 148

CIVIL PROCEDURE CODE (ACT VIII OF 1859), SEC. 73
—*Suit by a Hindu widow having a son—Limitation—Act XIV of 1859—Certificate of guardianship—Act XX of 1864.*] In 1864 a Hindu widow, having a minor son, sued, in her own name and on her own behalf, to recover certain immoveable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871 the son, who had in the meantime attained his majority in 1865, was made a co-plaintiff on his own application.

Held that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff, the plaint previously to that time having been in the widow's own name and expressly on her own behalf.

Held, also, that, as the widow had no certificate of guardianship, she was precluded by Act XX of 1864 from bringing a suit in her own name in respect of her son's property, and that making the son a co-plaintiff in 1871 could not change the character of the suit, as it had existed previous to that date, so as to defeat the law of limitation.

Held (by Pinhey, J.) that the minor was wrongly made a plaintiff in 1871.

GOPAL KASHI v. RAMA'BAI SAHEB PATVARDHAN ... 17

SECS. 106

& 119—*Practice—Abatement—Notice—Dismissal of suit—Limitation.*] Section 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff, after the institution of a suit, became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited,

Held that such order was irregular.

Held, also, that the Official Assignee, having notice of the order, was not entitled to further notice of the setting down of the suit for dismissal, he not having given the security required, and that the giving of such security was a condition precedent to his being made a party to the suit.

Where the suit was dismissed in accordance with the terms of the order mentioned above, and the Official Assignee did not apply, within thirty days of the passing of the order of dismissal, either to the Court making the order or to the Appellate Court, for its reversal,

Held that an application to the Appellate Court for the reversal of an order discharging a rule *nisi* for the reversal of the order of dismissal, and for the restoration of the suit to the board for hearing, was barred.

IBRA'HIM BIN MAHASIN *v.* ABDUR RAHIMA'N BIN ALI ... 257

CIVIL PROCEDURE CODE (ACT VIII OF 1859), SEC. 259—

Undivided Hindu family—Ancestral property—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession.] The purchaser, at a Court's sale, of the right, title and interest of one of the co-parceners in the undivided estate, by his certificate, under section 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of, as a member of the united family.

Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property, forming only a part of the common estate.

Where, however, the purchaser got into possession, and held it with such an accompanying right as the judgment-debtor could transfer to him,

Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a definition of the portions in which each party, in future, was to have a sole interest. Such co-parceners, however, are not entitled to eject the purchaser wholly from a defined moiety of any particular portion of the joint property.

MAHA'BALAYA' BIN PARMA'YA' *v.* TIMAYA' BIN APPAYA' ... 138

SEC. 259—

Certificate of sale—Registration.] Plaintiff and defendant were two auction-purchasers. Plaintiff's purchase was prior, but his certificate of sale was not registered. Defendant's purchase was subsequent, but he was in possession, and his certificate was registered. Registration was optional in both cases. In a contest as to priority between plaintiff and defendant,

Held that, under the provisions of Act XX of 1866, sec. 50, the defendant's title must prevail against that of the plaintiff.

PANHA' KHUMA'JI *v.* FATTA' UPADI ... 179

SECS. 284,

285—*Decree against a third Class Sardár—Execution against his son—Procedure.*] Under the authority of section 284 *et seq.* the Court of the Agent for Sardárs, not having jurisdiction over a Sardár's son, who is not himself a Sardár, cannot transfer a decree passed against the Sardár to a Civil Court for execution against the son. To obtain enforcement, in

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such a case, against his heir of a decree against the Sardār, the decree-holder may file a suit in the ordinary Civil Court on his decree.	
KHUSA'IDA'S v. SAKHĀ'RAM RA'MCHANDRA DIKSHIT ...	212
CIVIL PROCEDURE CODE (ACT VIII OF 1859), SECS. 351, 353— <i>Costs</i> .] The Appellate Court will not remand a case for re-trial on a point not raised in the Court below, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondent's costs of appeal.	
HARIDAS PURSHOTAM v. HENRY GAMBLE ...	23
COMMISSIONER FOR TAKING ACCOUNTS, APPEAL FROM ORDER MADE BY.	
See APPEAL ...	129
COMPROMISE— <i>Consideration—Contract</i> .] When a claim is once compromised, and a new contract entered into, the compromisor is estopped from pleading illegality or absence of consideration for the new contract, the real consideration of it being the withdrawal of the claim itself irrespective of the possibility of its being prosecuted to a successful issue. The new contract can only be questioned on the ground of fraud, such as want of good faith in making the claim compromised.	
VARAJLA'L SHIVLA'L v. DALSUKH VARAJLA'L...	196
CONCUBINE— <i>Maintenance—Gift</i> .] G., a member of an undivided Hindu family, died, leaving him surviving two nephews, V. A. and V. R., and Y., a concubine of G. V. A. lived with G. at the time of his death, and had the whole of G.'s property, moveable and immoveable, left in his (V. A.'s) possession. V. A., before his death, made a gift of the said property to Y. in consideration of her having been G.'s concubine for many years. In a suit brought by V. R. to recover the whole property from Y, she claimed it by virtue of the gift by V. A.	
<i>Held</i> that the gift was invalid as against V. R., who was entitled to the whole property, subject to the maintenance of Y. as a concubine of G. for many years; the High Court also directed the said maintenance to be secured for her (Y.) by investment of a sufficient part of the property in trust for that purpose.	
VRANDA'VANDA'S RAMDAS v. YAMUNA'BA'I ...	229
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CO-PARCENER— <i>Attachment and sale of interest of a co-parcener in undivided estate</i> .	
See EXECUTION OF DECREE...	138
CO-SHARERS— <i>Parties to suit—Practices</i> .] Where a suit was brought by one of two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other co-sharer:	
<i>Held</i> that the suit was not maintainable, and that the plaintiff could only sue jointly with his co-sharer, though the plaintiff was sole manager of the joint estate.	
KRISHNARAO JAHAGIRDA'R v. GOVIND TRIMBAK	85

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COSTS — <i>Practice—Payment of the costs of a summons not a condition precedent to proceeding with the suit.</i>] The Court will not order, as a condition precedent to proceeding to the hearing of a suit, the payment of the costs of a summons adjourned from chambers into Court, and there dismissed with costs.	
SOKA'BA'I v. LAKSHMIBA'I.	9
COURT FEES' ACT (VII OF 1870), SEC. 11 — <i>Additional stamp duty—Interest on decree.</i>] The Court Fees' Act (No. VII of 1870), sec. 11, is not applicable to interest accruing upon a decree in a suit which is neither for mesne profits nor for immoveable property, nor for an account, but simply an action for money lent.	
KRISHNARA'V v. ANTA'JI VIRUPAKSHA	227
CRIMINAL PROCEDURE CODE. — <i>Charge—Conviction of offence not charged—Re-trial.</i>] Where a person was charged by an Assistant Session Judge with (1) attempting to commit criminal breach of trust as a public servant; (2) framing as a public servant an incorrect document to cause an injury; (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent, The High Court held that the Judge ought to have convicted him of attempting to cheat under sections 455, 456 of the Code of Criminal Procedure; and, as the facts which he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing, though not distinctly taken in their appeal by the Government, and ordered a re-trial of the accused.	
REG. v. RA'MAJIRAV JIVBAJIRA'V	1
(ACT X OF 1872), SECS. 273 & 453— <i>Appeal—Aggregate sentence.</i>] For purposes of appeal the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence. <i>Semble</i> , that where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed. But, if a separate sentence be passed on each head, held that an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial, within the jurisdiction of the Appellate Court.	
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SECS.
284, 297—*Offence not triable by Subordinate Magistrate—Power of District Magistrate to annul conviction.*] Where, on appeal from a conviction, by a Subordinate Magistrate, of an offence triable by him, the Magistrate of the district is of opinion that the evidence in the case establishes a graver offence against the accused not triable by the Subordinate Magistrate,

Held that the Magistrate of the district has no power to annul the conviction and sentence under section 284 of the Code of Criminal Procedure, but should report the matter for the orders of the High Court.

REG. v. TUKARA'M RAGHO ... 234

CRIMINAL PROCEDURE ACT (HIGH COURT) X OF 1875,
SECS. 115, 147—*Certiorari*—Order of reference—Act XIII of 1856, Sec. 36—Order for delivery of property—Examination of witnesses.] *Semble* that the "case" mentioned in section 147 of the High Court's Criminal Procedure Act, X of 1875, must refer to some question in the nature of a criminal proceeding, and not to a matter of a *quasi* civil character, such as the reference to a Police Magistrate contemplated in section 115.

The power of the High Court to issue a writ of *certiorari* has not been taken away by section 147 of the High Court's Criminal Procedure Act, X of 1875.

The words "any property" in section 115 of the High Court's Criminal Procedure Act, X of 1875, include as well property voluntarily produced before the Magistrate by a witness in the case, as property seized by the police or found on the person of the prisoner.

The reference to a Magistrate under section 115 of the High Court's Criminal Procedure Act, X of 1875, is not a trial for the final determination of the rights of the parties, and it is not incumbent upon the Magistrate on such reference to hear witnesses, but he may rightly order the delivery of property to that one of the rival claimants whom he considers, upon the statement of their respective cases, to have made out a *prima facie* case, and it is not competent to the High Court to review the decision at which the Magistrate so arrives

REG. v. RAMDAS SA'MALDA'S ... 217

CUSTOM OF SHROFFS—Hundi.] The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable :

Held that, as between the plaintiff and the Ajmir constituent, the plaintiff, upon such credit in account being given, became a holder for value.

Held, also, that on the *hundi* being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value.

Held, also, that, as between the Ajmir constituent and the first indorser (the defendant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

SUGANCHAND SHIVDA'S v. MULCHAND JONA'RIMAL ... 113

DECREE—Execution—Sale—Contest between two rival auction-purchasers—Certificate of sale—Civil Procedure Code (Act VIII of 1859), Sec. 259—Registration Act XX of 1866, Secs.

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18 & 50.] Plaintiff and defendant were two auction-purchasers. Plaintiff's purchase was prior, but his certificate of sale was not registered. Defendant's purchase was subsequent, but he was in possession, and his certificate was registered. Registration was optional in both cases. In a contest as to priority between plaintiff and defendant, <i>Held</i> that, under the provisions of Act XX of 1866, sec. 50, the defendant's title must prevail against that of the plaintiff.	
PANHA' KHUMAJI v. FATTA' UPAJI ...	179
DECREE AGAINST A SARDAR ...	212
See SARDAR.	
<i>Application after decree—Execution—Mortgage—Redemption—Act XXIII of 1861.]</i> An application to the Court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.	
The proper course for a mortgagor who seeks for an account and redemption alone, is to bring an independent suit for that purpose.	
RAVJI SHIVRAM JOSHI v. KALURAM ...	160
A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor to the effect that the mortgagee should remain in possession until the mortgage-debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to the possession of the mortgaged property. Both the lower Courts granted the mortgagor's application.	
On special appeal <i>held</i> (following the decision of the Full Bench in <i>Ravji Shivram Joshi v. Kaluram Malukchand</i>) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.	
RAMCHANDRA BALLAL v. BABA' ESGONDA ...	163
AGAINST ONE OF SEVERAL PARTNERS.	
See EXECUTION OF DECREE ...	165
<i>Execution sale—Ancestral property—Undivided Hindu family—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession.]</i> The purchaser, at a Court's sale, of the right, title, and interest of one of the co-parceners in the undivided estate by his certificate under section 259 of the Civil Procedure Code of 1859 can take no more than the interest of such co-parcener in the property disposed of as a member of the united family.	
Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property forming only a part of the common estate.	

Where, however, the purchaser got into possession and held it with such an accompanying right as the judgment-debtor could transfer to him,

Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a definition of the portions in which each party in future was to have a sole interest. Such co-parceners, however, are not entitled to reject the purchaser wholly from a defined moiety of any particular portion of the joint property.

MAHA'BALAYA' BIN PARMA'YA' v. TIMAYA' BIN APPAYA' ... 138

DWYAMUSHYAYANA SON.

See ADOPTION 364

EJECTMENT—*Act II of 1865 (Bombay), Sec. 240—Limitation—Acquisition of land for public purposes—Compensation—Mesne profits.*] Bombay Act II of 1865, sec. 240, does not apply to suits in the nature of an action of ejectment.

Acts relating to the acquisition of lands for public purposes must be construed strictly in favour of the subject.

The Court will not oblige the plaintiff in a suit in the nature of an action of ejectment to accept compensation.

Quære—Whether a claim to recover the mesne profits of land, for which the plaintiff sues in ejectment, comes within the provisions of Bombay Act II of 1865, sec. 240.

SORABJI NASSARVA'NJI DUNDAS v. THE JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY ... 250

ENDOWMENTS—*Hindu religious endowments—Superstitious uses.*] The English law relating to superstitious uses does not apply in the case of Hindu religious endowments.

KHUSA'LCHAND v. MA'HA'DEVGIRI ... 214

EXECUTION OF DECREE—*Application after decree—Act XXIII of 1861, Sec. 11—Mortgage—Redemption.*] An application to the Court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.

The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose.

RA'VJI SHIVRA'M JOSHI v. KA'LURA'M ... 160

—A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgagee should remain in possession until the mortgage-debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage-decree, and applied to be restored to the possession of the mortgaged property. Both the lower Courts granted the mortgagor's application.

On special appeal *held* (following the decision of the Full Bench in *Ravji Shivram Joshi v. Kaluram Malukchand*) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.

RA'MCHANDRA BALLA'L v. BA'BA' ESGONDA ... 163

EXECUTION OF DECREE AGAINST ONE OF SEVERAL PARTNERS.] It is an improper way of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property, to sell that part, and then distribute the proceeds between the executing creditor and other partners of the firm.

KESHAV GOPA'L GINDE v. RAYA'PA' ... 165

Sale—Contest between two rival auction-purchasers—Certificate of sale—Act VIII of 1859, Sec. 259—Registration Act XX of 1866, Secs. 18 & 50. Plaintiff and defendant were two auction-purchasers. Plaintiff's purchase was prior, but his certificate of sale was not registered. Defendant's purchase was subsequent, but he was in possession, and his certificate was registered. Registration was optional in both cases. In a contest as to priority between plaintiff and defendant,

Held that, under the provisions of Act XX of 1866, sec. 50, the defendant's title must prevail against that of the plaintiff.

PANHA' KHUMA'JI v. FATTA' UPA'JI ... 179

Undivided Hindu family—Ancestral property—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession. The purchaser, at a Court's sale, of the right, title and interest of one of the co-parceners in the undivided estate, by his certificate, under section 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of as a member of the united family.

Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property forming only a part of the common estate.

Where, however, the purchaser got into possession, and held it with such an accompanying right as the judgment-debtor could transfer to him,

Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a definition of the portions in which each party, in future, was to have a sole interest. Such co-parceners, however, are not entitled to eject the purchaser wholly from a defined moiety of any particular portion of the joint property.

MAHA'BALAYA' BIN PARMA'YA' v. TIMA'YA' BIN APPAYA'. 138

EXECUTOR, INVESTMENT BY—*Liability of executor in Bombay for loss to testator's estate by reason of neglect to convert shares—Will—Trust.*] The rules and decisions of the Court of Chancery in England, relative to the duty of an executor to convert in the absence of any special direction to that effect in the will, do not, without great qualifications, apply in the High Court of Bombay; and the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in his administration of the estate.

Therefore, where the will of a Portuguese testator contained no special direction for conversion, nor any sufficient indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively *in specie*, so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to their testator, which subsequently became much depreciated in value,

Held that the executors were not liable for the loss so occasioned to the estate of the testator.

M. A. DE SOUZA v. IGNACIO FRANCISCO DE SOUZA ... 184

FAMILY ARRANGEMENT—*Agreement as to registration—Act XX of 1866, Sec 17.*] Where a document was in the nature of a family arrangement, and drawn up mainly for the purpose of settling a widow's maintenance, though some right in immoveable property was created or declared by such instrument, and it was proved that the actual value of the whole of the immoveable property mentioned in the document exceeded Rs. 100, but there was no evidence to show that the value of the widow's right exceeded that sum :

Held that, for the purpose of registration under Act XX of 1866, the actual value of the whole immoveable property named in the document must not be taken to be the value of the right so created or declared.

NILAVA' KOM RACHAPPA' v. RUDRAYA' BIN RACHAPPA' ... 141

GIFT—*Undivided Hindu family—Maintenance—Concubine.*]

A member of an undivided Hindu family on this side of India cannot, without the consent of his co-parceners, make a gift of his share in the undivided property.

G., a member of an undivided Hindu family, died, leaving him surviving two nephews, V. A. and V. R., and Y., a concubine of G. V. A. lived with G. at the time of his death, and had the whole of G.'s property, moveable and immoveable, left in his (V. A.'s) possession. V. A., before his death, made a gift of the said property to Y., in consideration of her having been G.'s concubine for many years. In a suit brought by V. R. to recover the whole property from Y., she claimed it by virtue of the gift to her by V. A.

Held that the gift was invalid as against V. R., who was entitled to the whole property, subject to the maintenance of Y. as a concubine of G. for many years; the High Court also directed the said maintenance to be secured for

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her (Y.) by investment of a sufficient part of the property in trust for that purpose.	
VRĀ'NDA'VANDA'S RAMDA'S v. YAMUNA'BAI...	229
GOSA'VI—Grant to a gosāvi and his disciples—Life interest—Superstitious uses—Hindu religious endowments.] A grant to a gosāvi and his disciples in perpetual succession, coupled with directions which practically make it an endowment of a <i>math</i> , with a limitation of the enjoyment to a particular line of celebrants of the worship therein, does not entitle an individual <i>gosāvi</i> to incumber the endowment beyond his own life.	
The English law relating to superstitious uses does not apply in the case of Hindu religious endowments.	
KHUSA'LCHAND v. MAHA'DEVGIRI	241
GUARDIAN—Suit by a Hindu widow having a son—Limitation—Act XIV of 1859—Certificate of guardianship—Act XX of 1864—Civil Procedure Code (VIII of 1859), Sec. 73.] In 1864 a Hindu widow, having a minor son, sued, in her own name and on her own behalf, to recover certain immoveable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871, the son, who had in the meantime attained his majority in 1865, was made a co-plaintiff on his own application.	
<i>Held</i> that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff, the plaint previously to that time having been in the widow's own name, and expressed on her own behalf.	
<i>Held</i> , also, that, as the widow had no certificate of guardianship, she was precluded by Act XX of 1864 from bringing a suit in her own name in respect of her son's property, and that making the son a co-plaintiff in 1871 could not change the character of the suit, as it had existed previous to that date, so as to defeat the law of limitation.	
<i>Held</i> (by Pinhey, J.) that the minor was wrongly made a plaintiff in 1871	
GOPA'L KA'SHI v. RAMA'BA'I SA'HEB PATVARDHAN	17
HEREDITARY OFFICE—Succession—Resumption—Adverse possession—Limitation.] J held the office of <i>patel</i> more than fifty years ago as representative of two branches descended from a common ancestor, and then united in interest, there being two other branches descended from the same ancestor, but severed in interest from those represented by J. J having died in 1824, was succeeded by his son T without any opposition from the two other branches. T was temporarily displaced from the office by G, who represented the two other branches, but recovered it in 1850. In an action brought by the plaintiff, as representative of G in 1873, to establish his claim to the office held by T's sons, it was contended on behalf of plaintiff, in answer to defendants' plea of limitation, that in the absence of evidence of the circumstances under which T succeeded to the <i>patel</i> -	

ship, T must be presumed to have been nominated to that office by all the members of the *vatanddr* family jointly, or with their assent sought and granted, and was, consequently, the representative of all of them :

Held that the succession of a son to his father in an hereditary office is primarily to be referred to a right based upon the relation subsisting between them, just as would be the son's succession to his father's property.

Held, also, that the presumption thus arising against T having been a nominee of all the branches of the family, and not having been rebutted by any evidence of an assertion and admission of the rights of the other branches, T's occupation of the *patelship* was adverse to the plaintiff's right, and being adverse at its beginning, it was equally adverse when, after a temporary displacement by G (whom the plaintiff now represents), T recovered it in 1850.

Held, also, that an interval of more than twelve years having passed between 1850 and the institution of the present suit in 1873, the claim was barred, and the possession of the office obtained by T's representatives could not be disturbed.

GIRIA'PA' v. JAKANA'...

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HIGH COURT'S CRIMINAL PROCEDURE ACT, X OF

1875, SECS. 115, 147—*Certiorari*—Order of reference—Act XIII of 1856, Sec. 36—Order for delivery of property—*Examination of witnesses*.] *Semble* that the "case" mentioned in section 147 of the High Court's Criminal Procedure Act, X of 1875, must refer to some question in the nature of a criminal proceeding, and not to a matter of a *quasi* civil character, such as the reference to a Police Magistrate contemplated in section 115.

The power of the High Court to issue a writ of *certiorari* has not been taken away by section 147 of the High Court's Criminal Procedure Act, X of 1875.

The words "any property" in section 115 of the High Court's Criminal Procedure Act, X of 1875, include as well property voluntarily produced before the Magistrate by a witness in the case, as property seized by the police or found on the person of the prisoner.

The reference to a Magistrate under section 115 of the High Court's Criminal Procedure Act, X of 1875, is not a trial for the final determination of the rights of the parties, and it is not incumbent upon the Magistrate on such reference to hear witnesses, but he may rightly order the delivery of property to that one of the rival claimants whom he considers, upon the statement of their respective cases, to have made out a *prima-facie* case, and it is not competent to the High Court to review the decision at which the Magistrate so arrives.

REG. v. RA'MDA'S SA'MALDA'S ...

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HIGH COURT, JURISDICTION OF

See JURISDICTION

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HINDU LAW—Adoption of the eldest or only son or sister's son—Gift in adoption by widow—Assent of husband when implied—Adoption among Brahmins and Sudras—Disqualification for adoption—Marriage—*Chûddakarana* and *Upanayana* ceremonies—A *dwyâmnushyayana* son.] In Western India an adoption among Sudras is not invalid, although

the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and, therefore, not a *sagotra* (*i.e.* of the same family) with the adopter.

Even among Brahmins marriage does not disqualify for adoption.

Quere—Whether the adoption of an *asagotra* married man belonging to any of the three regenerate classes would be invalid,

According to Hindu law, a second adoption is invalid, while the first adopted son exists and retains his character of a son.

Among Brahmins the adoption of a son for whom the *chūdākarana* and *upanayana* ceremonies have been performed in his natural family is not on that ground invalid. He notwithstanding acquires the legal *status* of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, their re-performance and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family.

A gift, by a Hindu widow, of her deceased husband's only son is invalid in the absence of an express authority conferred upon her by him during his life-time. Such an adoption, being null and void *ab initio*, cannot be supported by the maxim *quod fieri non debuit factum valet*.

Quere—Whether a gift in adoption of an only son by his father is void in the Presidency of Bombay.

In the Presidency of Bombay a widow may give in adoption a younger son where her husband has not by direct prohibition or otherwise indicated his unwillingness that she should, after his death, give such younger son in adoption, the husband's assent to such a gift being implied. But it cannot be implied to the gift, by his widow after his death, of an eldest and still less of an only son in adoption where he did not expressly indicate such assent in his life-time.

Semble—Where a father gives his only son in adoption as a *dwijāmushyayana*, he consents to deprive himself of one-half of the spiritual benefit derivable from the performance of religious obsequies. Hence his consent cannot be implied even to such a gift when made by his widow after his death. To such a case the *factum-valet* principle is wholly inapplicable, because the adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*.

The maxim *quod fieri non debuit factum valet* considered, and its application pointed out.

There can be no gift where there is an absence of authority, the attempt to give being a mere nullity. There is nothing in such an attempted transaction to set aside; it should simply be declared null and void *ab initio*.

There is no authority for drawing any distinction between Sudras and the other classes on the question of the legality of the adoption of an eldest or an only son.

Mhalsubai v. Vilhoba (7 Bom. H. C. Rep., Appx., p. xxvi) dissented from so far as it supported the gift in adoption, by a widow, of an only son without the authority of her husband.

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HINDU LAW— <i>Maintenance—Ancestral property—Purchaser bonâ fide and for value.</i>] The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a <i>bonâ fide</i> purchaser from her late husband's successors, any more than the payment of unsecured debts due by the family The proposition in <i>Ramchuran Tewaree v. Mussamat Jasoodu Koonwer</i> (2 Agra 134) that the liability of family property, in the hands of a purchaser, for the maintenance of a widow depends on the ability of her husband's heir to support her, dissented from.	
LAKSHMAN RA'MCHANDRA v. SARASVATIBAI ...	69
— <i>Alienation of family property by widow as manager—Maintenance—Inheritance of grandson's widow in preference to son's widow.</i>] Alienations for family purposes of the ancestral estate by a Hindu widow (the mother of a minor son), though she was not appointed an administratrix under Act XX of 1864, upheld as made by a <i>de facto</i> manager. A Hindu died, leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently his grandson died a minor, leaving his widow (also a minor) him surviving. Held that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property.	
BA'I AMRIT v. BA'I MA'NIK ...	79
— <i>Maintenance of son.</i>] A suit for maintenance out of ancestral estate by a Hindu son lies against his father where his property in the hands of the latter is impartible. <i>Quære</i> —Whether a like suit lies where the son might sue for partition.	
HIMMATSING BECHARSING v. GANPATISING ...	94
— <i>Undivided Hindu family—Ancestral property—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession.</i>] The purchaser, at a Court's sale, of the right, title, and interest of one of the co-parceners in the undivided estate, by his certificate, under section 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of, as a member of the united family. Course pointed out as to the ascertainment of what that interest is, and how that transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property, forming only a part of the common estate. Where, however, the purchaser got into possession and held it with such an accompanying right as the judgment-debtor could transfer to him, Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment or for a definition of the portions in which each party, in	

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future, was to have a sole interest. Such co-parceners, however, are not entitled to eject the purchaser wholly from a defined moiety of any particular portion of the joint property.	
Maha'balaya' bin Parma'ya' v. Tima'ya bin Appaya ...	138
HINDU LAW— <i>Undivided Hindu family—Suit for partition—Separation by living and separation by partition.</i>	
See PARTITION ...	148
<i>Undivided Hindu family—Gift—Maintenance—Concubine.</i>] A member of an undivided family on this side of India cannot, without the consent of his co-parceners, make a gift of his share in the undivided property.	
<i>Gangubai v. Ramdanna</i> (3 Bom. H. C. Rep. A.C.J. 66) followed.	
G, a member of an undivided Hindu family, died, leaving him surviving two nephews, V.A. and V.R., and Y., a concubine of G. V. A. lived with G. at the time of his death, and had the whole of G.'s property, moveable and immoveable, left in his (V. A.'s) possession. V. A., before his death, made a gift of the said property to Y. in consideration of her having been G.'s concubine for many years. In a suit brought by V. R. to recover the whole property from Y, she claimed it by virtue of the gift to her by V. A.	
<i>Held</i> that gift was invalid as against V. R., who was entitled to the whole property, subject to the maintenance of Y. as a concubine of G. for many years; the High Court also directed the said maintenance to be secured for her (Y.) by investment of a sufficient part of the property in trust for that purpose.	
VBA'NDA'VANDA'S RAMDA'S v. YAMUNA'BA'I ...	229
<i>Suit by a Hindu widow having a son—Limitation—Act XIV of 1859—Certificate of guardianship—Act XX of 1864—Civil Procedure Code (Act VIII of 1859), Sec. 73.]</i> In 1864 a Hindu widow, having a minor son, sued, in her own name and on her own behalf, to recover certain immoveable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871 the son, who had in the meantime attained his majority in 1865, was made a co-plaintiff on his own application:	
<i>Held</i> that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff, the plaint previously to that time having been in the widow's own name and expressly on her own behalf.	
<i>Held</i> , also, that, as the widow had no certificate of guardianship, she was precluded, by Act XX of 1864, from bringing a suit in her own name in respect of her son's property, and that making the son a co-plaintiff in 1871 could not change the character of the suit, as it had existed previous to that date, so as to defeat the law of limitation.	
<i>Held</i> (by Pinhey, J.) that the minor was wrongly made a plaintiff in 1871.	
GOPA'L KA'SHI v. RAMA'BA'I SA'HEB PATVARDHAN ...	17

HUNDI—*Cause of action—Consideration—Usage of shroffs—Jurisdiction.*] Where a *hundi* had been drawn out of Bombay upon a person in Bombay, indorsed and delivered, out of Bombay, to one who, out of Bombay, indorsed the same and sent it to a person who, in Bombay, received it, got it accepted and presented it for payment to the drawee, by whom, in Bombay, it was dishonoured :

Held that the dishonour of the *hundi* by the drawee in Bombay was a material part of the cause of action by the Bombay holder against the first indorser, and, consequently, that such material part of the cause of action having arisen in Bombay, and the holder having obtained leave to bring his suit under clause XII of the Letters Patent, 1865, the Court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and on its acceptance by the drawee credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable :

Held that, as between the plaintiff and the Ajmir constituent, the plaintiff, upon such credit in account being given, became a holder for value.

Held, also, that on the *hundi* being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value.

Held, also, that as between the Ajmir constituent and the first indorser (the defendant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

SUGANCHAND SHIVDA'S v. MULCHAND JOHA'RIMAL ... 113

INDEMNITY—*Suit on indemnity bond—Limitation—Cause of action.*] On the 27th July 1868, plaintiff received from defendant an indemnity bond promising to indemnify plaintiff against the misbehaviour of a third person. On the 4th June 1870 the third person committed an act of embezzlement. In an action brought by plaintiff on the 28th June 1873 on the indemnity bond, the first Court held the claim barred under clauses 63 and 84 of schedule II, Act IX of 1871. In appeal that decree was reversed, and the claim allowed under clause 95 of the same schedule.

The High Court, on special appeal, *held* that clauses 63 and 84, and not clause 95, applied to the case, as the suit was one, not for relief on the ground of fraud, but for breach of a contract to indemnify against fraud.

SHA'PURJI JAHANGIRJI v. THE SUPERINTENDENT OF THE POONA CITY JAIL ... 238

INHERITANCE—*Grandson's widow—Son's widow—Maintenance.*] A Hindu died leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently his grandson died a minor, leaving his widow (also a minor) him surviving :

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<i>Held</i> that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property.	
BA'I AMRIT v. BA'I MA'NIK	79
INJUNCTION— <i>Bombay Act III of 1872—Town duty—“Spirits”—Toddy.</i>] <i>Quære</i> —Whether the Court ought to interfere by way of injunction with the exercise of a right, or alleged right, of officers of a municipal body to levy taxes and dues.	
Toddy-juice, whether in a fermented or unfermented state, is not “spirits” within the meaning of Bombay Act III of 1872, and is, therefore, not liable, on importation into Bombay, to a town duty of As. 4 per gallon imposed on spirits by Schedule B of that Act.	
HORMASJI KARSETJI v. W. G. PEDDER	199
INSURANCE— <i>English law applicable to Hindus—Valued policy—Over-valuation—Subrogation—Practice—Points raised on appeal not taken in the Court below—Civil Procedure Code (Act VIII of 1859), Secs. 351 & 353—Costs.</i>] Where the defendants, underwriters of a policy of insurance on goods on board a vessel bound from Bombay to Calcutta, were Hindus, but no principle of Hindu law was applicable, the parties having selected the English language for the expression of their contract, <i>held</i> that the case was to be determined in accordance with the principles of English law.	
A valuation of salt, based on the loss which the owner may possibly incur on account of the bonds in respect of the salt passed by him to the Government, though greatly in excess of the real value of the salt, is not such an over-valuation as amounts to proof of fraud.	
Where, in a valued policy of insurance, the goods insured were valued at an amount greatly in excess of their real value, which amount was intended to include the amount in which the insured was liable to Government on account of bonds executed by him in respect of the goods insured, and after loss of the goods Government elected not to enforce the bonds, <i>held</i> that the underwriters were entitled to be subrogated in the amount of the bonds, and were liable to the insured only for the real value of the goods together with a fair profit.	
The Appellate Court will not remand a case for re-trial on a point not raised in the Court below, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondent's costs of appeal.	
HARIDA'S PURSHOTAM v. HENRY GAMBLE	23
IZAFATDAR.] An <i>izafatdār</i> is not a public servant within the meaning of section 21 of the Indian Penal Code.	
See PENAL CODE	1
JURISDICTION— <i>Agent's Court—Suit against a Sardār—Practice—Point not raised in the lower Courts.</i>] Creation of the defendant as Sardār in 1867 cannot have a retrospect-	

ive effect so as to affect a suit instituted against her in the Civil Court in 1861 and to render the decree of that Court one without jurisdiction.

A point not raised in the Courts below, was disallowed as being too late when raised in the special appeal for the first time.

RAMA'BA'I SA'HEB PATVARDHAN v. APPA' ...

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JURISDICTION OF CIVIL COURTS IN QUESTIONS OF

ASSESSMENT—*Regulation XVII of 1827.*] The jurisdiction of Civil Courts in questions of assessment as that jurisdiction stood under Regulation XVII of 1827, chap. I, as confined to cases where the contention is that there is a right on the part of the occupant of the assessed land in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved.

THE GOVERNMENT OF BOMBAY v. SUNDARJI SAVRA'M.

Appx. 273

—*Ordinary Original Civil Jurisdiction of High Court—Letters Patent, 1865, Cl. XII—Cause of action—Hundi—Consideration—Usage of shreffs.*] The High Courts are not Courts of ordinary original civil jurisdiction over the whole of the territories of the presidencies to which they belong, and there is no presumption in favour of jurisdiction beyond what is found expressly conferred by the charters of constitution.

The decisions of the English Courts on sections 18 and 49 of the Common Law Procedure Act (15 & 16 Vic., ch. 76,) relating rather to matter of procedure than of jurisdiction, are not so much in point with regard to the interpretation of clause XII of the Letters Patent, 1865, as the decisions on section 128 of the English County Courts Act (9 & 10 Vic., ch. 95,) which are directed to the marking out and limiting of the jurisdiction of a Court.

Some remarks of Holloway, J., in *De Souza v. Coles* (3 Mad. H. C. Rep. 413) as to the propositions involved in *Lucknitchand v. Zarawar Mull* (8 Moore I. A. 291) dissented from.

Where a *hundi* had been drawn out of Bombay upon a person in Bombay, indorsed and delivered, out of Bombay, to one who, out of Bombay, indorsed the same and sent it to a person who, in Bombay, received it, got it accepted and presented it for payment to the drawee, by whom, in Bombay, it was dishonoured:

Held that the dishonour of the *hundi* by the drawee in Bombay was a material part of the cause of action by the Bombay holder against the first indorser, and, consequently, that such material part of the cause of action having arisen in Bombay, and the holder having obtained leave to bring his suit under clause XII of the Letters Patent, 1865, the Court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable.

Held that, as between the plaintiff and the Ajmir constituent, the plaintiff, upon such credit in account being given, became a holder for value.

Held, also, that on the *hundi* being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value.

Held, also, that, as between the Ajmir constituent and the first indorser (the defendant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff, and sued on by him.

SUGANCHAND SHIVDA'S v. MULCHAND JOHA'IMAL ... 113
KABILPUR.

See LAND REVENUE ... Appx. 225

KANARA LAND REVENUE—*Muli*—*Land tenure*—*Bombay Act VII of 1863*—*Bombay Act I of 1865*—*Bombay Regulation XVII of 1827*.] The Mulavargdar, a holder of land on *Muli* tenure in Kanara, enjoys an hereditary and transferable property in the soil, and cannot be ousted so long as he pays the land revenue assessed upon his land.

In the absence of special terms to the contrary, Government may enhance the land revenue payable in respect of land so held.

The history of the land revenue in Kanara narrated.

The question of the cultivating rayat's property in the soil considered both with reference to the Hindu and the Muhammadan law.

Similarity of the Mirási, Kaniyatchi, the Janmakari, the Swasthyan, and the *Muli* tenures mentioned.

The rule of the Hindu and Muhammadan as well as of the English law is *nullum tempus occurrit regi*.

The extent to which that maxim has been restrained by legislation in the Presidency of Bombay considered.

Construction of Bombay Act VII of 1863, sec. 21, and Bombay Act I of 1865, secs. 25 and 49.

The revenue system of Akbar under Todar Mul, and of Aurangzib discussed.

If there be no specific limit, either by grant, contract, or law, to the right of Government to assess land for the purpose of land revenue, the Civil Courts have no jurisdiction under Bombay Regulation XVII of 1827, secs. 4 and 7, to entertain a suit to rectify the assessment made by the Collector or other competent revenue authority.

VIKUNTA BA'PUJI v. THE GOVERNMENT OF BOMBAY... Appx. 1

KHOJA MUHAMMADANS, HINDU LAW APPLIED TO.]

It must be considered as the settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance and succession among Khojá Muhammadans, and this rule was held to apply in a case of Khojás at Thána, no evidence having been given in that case to show its inapplicability to the Khojás of that place.

SHIVJI HA'SAM v. DATU M'AVJI KHOJA' ...

KHOJA MUHAMMADANS—*Inheritance—Letters of administration—Custom.*] In the absence of satisfactory proof of a custom differing from the Hindu law, the Courts of this Presidency apply to Khojás the Hindu law of inheritance and succession.

If a custom opposed to Hindu law be alleged to exist amongst Khojás, the burden of proof rests upon the person setting up that custom.

The Khojás, having been originally Hindus and converted from the Hindu religion by a Dái, or Missionary of the Imám of the Ismáilis, to the Muhammadan religion of the Shiá division and Imámi Ismáili sub-division, and being partly regulated by Muhammadan law, partly by Hindu law, and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khojá community.

A Khojá having died intestate, and without leaving issue, was survived by his mother (a widow), his wife and a married sister.

Held that, according to the custom of the Khojás, his mother was entitled to the management of his estate, and, therefore, to letters of administration, in preference to his wife or his sister.

HIRBA'I v. GORBA'I ...

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Jurisdiction—Rule for the regulation of the rights of dissident parties in a community distinguished by some religious profession—Sunis—Shiás—Shiá Imámi Ismáilis—Agá Khán—Khojás—Injunction.] In a suit by certain members of the Khojá community in Bombay for an account of all property belonging to, or held in trust for, the community come to the hands of the treasurer and accountant of the community; for a declaration that the treasurer and accountant had ceased to be such officers of the community; for an order directing the treasurer and accountant to deliver all the property of the community in their hands; for a declaration that the property of the community was held and ought to be applied to and for the original charitable, religious, and public uses or trusts to or for which they were dedicated and to none other, for the sole benefit of the Khojá sect and none other; and that no person not being or having ceased to be a member of the same, and in particular no person professing Shiá opinions in matters of religion, was entitled to any share or interest therein; for a scheme to carry such declaration into effect; and for an injunction restraining one of the defendants from interfering in the management of the property and affairs of the Khojá community or in the election and appointment of officers, from excommunicating any members of the community, from celebrating marriages, and from demanding or receiving any offering:

Held that the Court had jurisdiction to entertain the suit.

When the Court, in exercise of its charitable jurisdiction, is called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the litigants will be regulated by reference to the religious tenets held by the community in its origin, and a minority holding those tenets will prevail against a majority which has receded from them.

History of the sects of Sunis, Shiás and Shiá Imámi Ismáíliis.

History of Agá Khán.

History of the Khojás and their relations with the hereditary Imám of the Ismáíliis.

Relations of Agá Khán with the Jamát of the Khojás of Bombay.

The tenets of Muhammadanism to which the first Khojás were converted were those of the Shiá Imámi Ismáíli sect.

In order to enjoy the full privileges of membership in the Khojá community, a person must be one of that sect whose ancestors were originally Hindus, which was converted to, and has throughout abided in the faith of, the Shiá Imámi Ismáíliis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imáms of the Ismáíliis.

There is no public property impressed with a trust, either express or implied, for the benefit of the whole Khojá community.

Agá Khán, as the spiritual head of the Khojás, is entitled to exercise a potential voice in determining who, on religious grounds, shall or shall not remain members of the Khojá community.

THE ADVOCATE GENERAL *ex relations* DAYA' MUHAMMAD
v. MUHAMMAD HUSEN HUSENI ... 323

LANDS, ACTS RELATING TO ACQUISITION OF, FOR PUBLIC PURPOSES—*Construction.*] Acts relating to the acquisition of lands for public purposes must be construed strictly in favour of the subject.

SORA'JI NASARVA'JI DUNDAS v. THE JUSTICES OF THE
PEACE FOR THE CITY OF BOMBAY ... 250

LAND REVENUE—*Survey—Assessment—Jurisdiction—Act I of 1865—Regulation XVII of 1827—Prescription—Bombay Act VII of 1863—Surat.*] The jurisdiction of the Civil Courts in the Presidency of Bombay in matters of revenue and land assessment considered and defined.

The enactments limiting the operation, in the Presidency of Bombay, of the maxim *nullum tempus occurrit regi* considered.

The land tenures of the district of Surat described.

The village of Kabilpur, in the district of Surat, is an *udhad bandhijama* village, settled for hereditarily and of right, by the co-sharers in it, in the gross at a fixed immutable rent, independent of the quantity of land under cultivation, payable to Government, and, as such, falls, in respect of the joint liability of the holders for the revenue in gross, within section 8 of Regulation XVII of 1827.

The village of Kabilpur is land, situated in a district ceded by the Peishwa in 1802 to the British, held by the co-

sharers in it and their predecessors in title partially exempt from payment of land revenue, under a tenure recognized by the custom of the country, for more than thirty years, and, therefore, falls within the claims for exemption mentioned in Bombay Act VII of 1863, sec. 21.

Whether sec. 2, cl. 1, and sec. 8 of Regulation XVII of 1827 and sec. 21 of Bombay Act VII of 1863 are or are not controlled by Bombay Act I of 1865, the village of Kabilpur is liable to assessment to the extent of Rs. 1,089-13-1 only, inasmuch as it falls within the concluding proviso in Bombay Act I of 1865, saving from further assessment a village entered in the land register as partially exempt from payment of land revenue.

Comparison of this (the Kabilpur) case with that of Kánara (*Vyakunta Bāpuji v. The Government of Bombay*), Appendix p. 1.

THE GOVERNMENT OF BOMBAY *v.* HARIBHAI MONBHAI. Appx. 225

LAND REVENUE—*Kánara—Muli—Land tenure—Bombay Act VII of 1863—Bombay Act I of 1865—Bombay Regulation XVII of 1827.*] The Mulavargdar, a holder of land on Muli tenure in Kánara, enjoys an hereditary and transferable property in the soil, and cannot be ousted so long as he pays the land revenue assessed upon his land.

In the absence of special terms to the contrary, Government may enhance the land revenue payable in respect of land so held.

The history of the land revenue in Kánara narrated.

The question of the cultivating rayat's property in the soil considered both with reference to the Hindu and the Muhammadan law.

Similarity of the Mirási, Kaniyatchi, the Janmakari, the Swasthyan and the Muli tenures mentioned.

The rule of the Hindu and Muhammadan as well as of the English law is *nullum tempus occurrit regi*.

The extent to which that maxim has been restrained by legislation in the Presidency of Bombay considered.

Construction of Bombay Act VII of 1863, sec. 21, and Bombay Act I of 1865, secs. 25 and 49.

The revenue system of Akbar under Todar Mul, and of Aurangzib discussed

If there be no specific limit, either by grant, contract, or law, to the right of Government to assess land for the purpose of land revenue, the Civil Courts have no jurisdiction under Bombay Regulation XVII of 1827, secs. 4 and 7, to entertain a suit to rectify the assessment made by the Collector or other competent revenue authority.

VIYAKUNTA BĀPUJI *v.* THE GOVERNMENT OF BOMBAY. Appx. 1

See ASSESSMENT ... Appx. 275, 276

LETTERS PATENT, 1865, CL. XII.

See JURISDICTION ... 113

LIMITATION—*Court's sale—Title—Right of owner to contest right of auction-purchaser.*] All that passed under a Court's sale under Regulation IV of 1827 (like a similar sale under the Civil Procedure Code) was the right, title, and interest of the judgment-debtor, whose property was proclaimed for sale, and it was quite open to a person claiming such

property as his own, to contest the right of the auction-purchaser (and those claiming under him) to interfere with his possession at any time within twelve years of the occurrence of the disturbance.

KUSHA'BA' BIN SANKROVI v. PITA'MBA'RDHARI ... 15

LIMITATION—*Suit by a Hindu widow having a son—Act XIV of 1859—Certificate of guardianship—Act XX of 1864—Civil Procedure Code (Act VIII of 1859), Sec. 73.*] In 1864 a Hindu widow, having a minor son, sued in her own name and on her own behalf to recover certain immoveable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871, the son, who had in the meantime attained his majority in 1865, was made a co-plaintiff on his own application :

Held that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff, the plaint previously to that time having been in the widow's own name and expressly on her own behalf.

Held, also, that as the widow had no certificate of guardianship, she was precluded, by Act XX of 1864, from bringing a suit in her own name in respect of her son's property, and that making the son a co-plaintiff in 1871 could not change the character of the suit, as it had existed previous to that date, so as to defeat the law of limitation.

Held (by Pinhey, J.) that the minor was wrongly made a plaintiff in 1871.

GOPAL KA'SHI v. RAMA'BAI SA'HEB PATVARDHAN ... 17

—*Act XIV of 1859—Act IX of 1871, Secs. 1 & 22—"Instituted"—"Commenced"—Contribution—Partnership—Account.*] *Quere*—Whether the word "commenced" in section 22 of Act IX of 1871 is equivalent to the word "instituted" in section 1, and whether section 1 does not exclude from the operation of the Act all suits instituted before 1st April 1873, even as to defendants added after that date.

Supposing the provisions of section 22 of Act IX of 1871 to apply to defendants added by amendment subsequently to 1st April 1873, in a suit instituted before that date, such added defendants will, under the terms of that section, and if that section does not apply, then under a general principle of law, be allowed to reckon the period of limitation on which they rely from the date at which they were added, but the periods of limitation provided by Act IX of 1871 do not necessarily apply to defendants so added.

The plaintiff and three of the defendants, being four members of a partnership consisting of seven persons, borrowed, in January and February 1865, on account of the partnership, from the Commercial Finance and Stock Exchange Corporation two sums of Rs. 1,21,614 and Rs. 1,08,000, for which they gave their joint and several promissory notes; and shortly afterwards two of the partners retired, leaving the plaintiff and the four defendants alone constituting the firm. On 27th September 1865 the plaintiff and first defendant were sentenced to transport.

ation for life, and on 15th April 1867 one of the other defendants became insolvent. On 25th April 1867 the liquidators of the Commercial Finance and Stock Exchange Corporation obtained a decree against the plaintiff and the three defendants who had joined in the making of the promissory notes for the amount due on their joint and several promissory notes and costs. In March 1868 the immoveable and moveable property of the plaintiff and the moveable property of the first defendant were sold in execution, and the whole of the proceeds of the plaintiff's immoveable property, together with the balance of the proceeds of the moveable properties of the plaintiff and first defendant, after satisfying thereout two prior decrees against them, were applied in part satisfaction of the decree of 25th April 1867, and the moneys so recovered were distributed to the shareholders by the liquidators, who, however, retained in their hands such portion as would have been payable in respect of the shares held by the judgment-debtors, and thus the whole decree was satisfied, leaving a balance of Rs. 25,212. The distribution of assets was made on 3rd April 1869, and the final dividend to shareholders other than the judgment-debtors paid on 3rd August 1869. The two defendants other than the first and the insolvent took the benefit of Act XXVIII of 1865, and obtained their discharge in April and December 1869. The plaintiff, therefore, sued the first defendant alone on 18th March 1873 as contributory for the satisfaction of the joint decree, but subsequently, by amendment made on the 6th February 1874, added the other defendants, and prayed for a decree that he was entitled to receive and appropriate the balance of Rs. 25,212, and that the first defendant should pay to the plaintiff the balance of the moneys paid by him in excess of his share in satisfying the decree of 25th April 1867, with interest, after deducting three-fourths of the sum of Rs. 25,212, or that, if necessary, the partnership accounts might be taken, and the plaintiff be paid such sums as might be found to be due to him :

Held—1st.—That the period of limitation as to all the defendants was that provided by Act XIV of 1859, whether the suit was to be treated as one for a partnership account, or one for contribution of an ascertained sum.

2nd.—That as to the first defendant the period of limitation was to be reckoned back from 18th March 1873.

3rd.—That as to the added defendants the period of limitation was to be reckoned back from 6th February 1874.

4th.—That the giving of the promissory notes was not a partnership transaction so as to debar the plaintiff from a suit for contribution without asking for a general account of the partnership dealings.

5th.—That the first defendant having, by his written statement, pleaded that, if a general partnership account were taken, he would be found not to be indebted to the plaintiff in respect of the contribution claimed, could not also plead the Limitation Act as a bar to the taking of such account.

6th.—That the plaintiff's cause of action arose in April 1868, when his property was sold and applied in satisfaction of the joint decree of 25th April 1867; and not on the date of the decree itself.

DAYA'L JAIRA'S v. KHATAV LADHA' ... 97

LIMITATION—Mortgage—Redemption—Adverse possession—
Act XIV of 1859, Sec. 1, Cl. 15.] A mortgagor sued his mortgagee to redeem, joining as defendant the person in possession of the mortgaged land, who claimed to hold adversely to both the mortgagor and the mortgagee.

Held that the possession of the last defendant being a trespass, not on the possession of the mortgagor, who had only the equitable estate, but on the possession of the mortgagee, in whom the legal estate was vested, and the person in possession not pretending to be a *bond fide* purchaser from the mortgagee, he did not come within the exception in section 5 of Act XIV of 1859; that the trespasser could only succeed to such estate as the mortgagee possessed; and, consequently, that the limitation applicable to the suit as against him was sixty years according to section 1, clause 15 of Act XIV of 1859, the effect of which is not altered by any hostile possession commenced on a title independent of the mortgage.

VITHOBA BIN CHABU v. GANGA'RAM BIN BIRAMJI ... 18

—*Act IX of 1871, Sched. II, Cls. 63, 84 & 95—Suit on an indemnity bond—Fraud—Cause of action.*] On the 27th July 1868 plaintiff received from defendant an indemnity bond, promising to indemnify plaintiff against the misbehaviour of a third person. On the 4th June 1870 the third person committed an act of embezzlement. In an action brought by plaintiff on the 28th June 1873 on the indemnity bond, the first Court held the claim barred under clauses 63 and 84 of Schedule II, Act IX of 1871. In appeal that decree was reversed, and the claim allowed under clause 95 of the same schedule.

The High Court, on special appeal, *held* that clauses 63 and 84, and not clause 95, applied to the case; as the suit was one, not for relief on the ground of fraud, but for breach of a contract to indemnify against fraud.

SHA'PURJI JAHANGIRJI v. THE SUPERINTENDENT OF THE
 POONA CITY JAIL ... 238

MAINTENANCE—Ancestral property—Hindu Law—Purchaser
bond fide and for value.] The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a *bond fide* purchaser from her late husband's successors any more than the payments of unsecured debts due by the family.

The proposition in *Ramchurun Tewares v. Mussamat Jasooda Koonwer* (2 Agra 134), that the liability of family property, in the hands of a purchaser, for the maintenance of a widow, depends on the ability of her husband's heir to support her, dissented from.

LAKSHMAN RAMCHANDRA v. SARASVATIBA' ... 69

—*SON'S WIDOW ENTITLED TO.*] A Hindu died, leaving him surviving a daughter-in-law and a grandson

(the widow and son of a predeceased son). Subsequently his grandson died a minor, leaving his widow (also a minor) him surviving.

Held that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property.

BA'I AMRIT v. BA'I MA'NIK ... 79

MAINTENANCE, SUIT FOR, BY A SON.] A suit for maintenance out of ancestral estate by a Hindu son lies against his father where the property in the hands of the latter is impartible.

Quære—Whether a like suit lies where the son might sue for partition.

HIMMATSING BECHARSING v. GANPATISING ... 94

MAJORITY, AGE OF

See MINORS' ACT ... 281

MANAGER—Family property—Alienation by Hindu widow.] Alienations for family purposes of the ancestral estate by a Hindu widow (the mother of a minor son), though she was not appointed an administratrix under Act XX of 1864, upheld as made by a *de facto* manager.

BA'I AMRIT v. BA'I MA'NIK ... 79

MARINE INSURANCE.

See INSURANCE ... 23

MAXIM—Nullum tempus occurrit regi.] Whether sec. 2, cl. I, and sec. 8 of Reg. XVII. of 1827 and sec. 21 of Bombay Act VII of 1863 are or are not controlled by Bombay Act I of 1865, the village of Kabilpur is liable to assessment to the extent of Rs. 1,089-13-1 only, inasmuch as it falls within the concluding proviso in Bombay Act I of 1865, saving from further assessment a village entered in the land register as partially exempt from payment of land revenue.

THE GOVERNMENT OF BOMBAY v. HARIBHA'I MONBHA'I Appx. 225

MAYUKHA, AUTHORITY OF, IN WESTERN INDIA.] In Western India, on questions of inheritance, the first place is assigned to the Mitákshara, and only a subordinate, though still an important one, to the Mayukha, on the authority of the responses delivered officially by the shás-tris of the Courts and oral statements of persons learned in the Hindu law of this Presidency.

KRISHNA'JI VYANKTESH v. PANDURANG ... 65

MINORS' ACT (BOMBAY) XX OF 1864.

See GUARDIAN ... 17

SEC. 1—Bengal Mi-nors' Act XL of 1858, Sec. 2—Age of majority—Charge of mi-nors' property—Custom among Khojds—Joint Hindu family.] Under Act XX of 1864, sec. 1, it is the charge of a minor's property and not the property itself which shall vest in the Civil Courts—a distinction which has been overlooked in *Bai Kesar v. Bai Ganga* (8 Bom. H. C. Rep. A. C. J. 33).

The meaning of the 1st section of Act XX of 1864, when regarded in connection with the sequel thereof (which provides, for the information of the Civil Court, no such means, regarding the deaths of persons leaving infant children, as would enable the Court to act *ex mero motu* in every such case), is that the care of the persons of all minors (not being European British subjects) and the charge of their property shall be, as expressly provided in the Bengal Minors' Act XL of 1858, "subject to the jurisdiction of the Court," and there is nothing in the subsequent sections of the Bombay Minors' Act which would lead to the conclusion that, until the Court is moved to exercise its jurisdiction, the care of the minors themselves or the charge of their property is vested in the Court, or that more was intended than that, like the Court of Chancery in England, the principal Civil Courts of districts should have the right, if moved so to do, and if they so think proper, to take care of the persons of minors and charge of their property, and that, until the Court does so, the minors cannot be regarded as wards of the Court or their property as in its charge.

It is only for the purposes of Act XX of 1864 that eighteen is laid down as the age of majority (section 30). The Legislature has not, by that Act, intended to prescribe eighteen as the age of majority for all persons of all castes and creeds and for all purposes. That limit is not applicable to any person, until the Act be brought into play by the exercise of the Civil Court's jurisdiction.

It must be considered as the settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession among Khojā Muhammadans, and this rule was held to apply in a case of Khojās at Thāna, no evidence having been given in that case to show its inapplicability to the Khojās of that place.

One member (although an infant) of an undivided family, governed by the Mitākshara law, has not such an interest in the joint property as is capable of being taken charge of and managed by the Civil Court or a guardian appointed under Act XX of 1864.

Quære—Whether, under Act XX. of 1864, the principal Civil Court of Original Jurisdiction in the district can take charge of the property of a person who has completed his sixteenth year, but is under eighteen.

SHIVJI HA'SAM v. DATU MA'VI KHOJA' ... 281

MITAKSHARA, AUTHORITY OF, IN WESTERN INDIA.]

In Western India, on questions of inheritance, the first place is assigned to the Mitākshara, and only a subordinate, though still an important one, to the Mayukha, on the authority of the responses delivered officially by the shāstris of the Courts and oral statements of persons learned in the Hindu law of this Presidency.

KRISHNAJI VYANKTESH v. PA'NDURANG ... 65

MORTGAGE—*Account.*] A mortgagee in possession is liable to account for profits arising from trees planted by himself on the mortgagor's land.

A mortgagee in personal possession is, in the absence of any special contract to the contrary, chargeable with a fair occupation rent in the case of buildings personally occupied by him for the purpose of residence or carrying on trade or business; and, in the case of land personally occupied or cultivated by him, either with a fair occupation rent or with the actual net profits realized from the use of the land.

In ascertaining what those profits are with which the mortgagee ought to be credited in reduction of his mortgage debt with interest thereon, the mortgagee ought to be credited for his expenses in obtaining produce from the land and a moderate interest on the amount of such expenses.

Principles laid down on which an account should be taken from a mortgagee in possession.

PRABHA'KAR CHINTA'MON DIKSHIT v. PA'NDURANG VINA'YAR DIKSHIT ... 88

MORTGAGE—Redemption—Account—Practice—Decree—Execution—Application after decree—Act XXIII of 1861, Sec. 11.] An application to the Court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.

The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose.

RA'VJI SHIVRA'M JOSHI v. KALURA'M ... 160

—A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgagee should remain in possession until the mortgage debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to the possession of the mortgaged property. Both the lower Courts granted the mortgagor's application.

On special appeal held (following the decision of the Full Bench in *Rāvji Shivrām Joshi v. Kalurām Mālukchand*) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.

RA'MCHANDRA BALLA'L v. BA'BA' ESGONDA ... 163

—**Redemption—Adverse possession—Limitation, Act XIV of 1859, Sec. 1, Cl. 15.]** A mortgagor sued his mortgagee to redeem, joining as defendant the person in possession of the mortgaged land, who claimed to hold adversely to both the mortgagor and the mortgagee.

Held that the possession of the last defendant being a trespass, not on the possession of the mortgagor, who had only the equitable estate, but on the possession of the mortgagee, in whom the legal estate was vested, and the person in possession not pretending to be a *bona-fide* purchaser from the mortgagee, he did not come within the exception in section 5 of Act XIV of 1859; that the trespasser could

only succeed to such estate as the mortgagee possessed; and, consequently, that the limitation applicable to the suit as against him was sixty years, according to sec. 1, cl. 15, of Act XIV of 1859, the effect of which is not altered by any hostile possession commenced on a title independent of the mortgage.

VITHOBA' BIN CHABU v. GANGA'RA'M BIN BIRAMJI ... 180

MORTGAGE—*'Sân' mortgage (mortgage without possession in Gujarât)—Registration Act XX of 1866, Sec. 50.]* Under section 50 of the Registration Act XX of 1866, a registered instrument takes effect as regards the property comprised therein against every unregistered instrument relating to it, whether or not the grantor of those instruments be the same.

As between himself and his mortgagor and also as against any subsequent unregistered assignee of the latter; an unregistered *sân* mortgagee in Gujarât has a perfectly valid charge upon the property mortgaged; but his right against such property is liable to be defeated by the mortgagor or his heir or such assignee conveying it to another by a registered instrument while his own title remains unregistered.

Lakhmichand v. Kastur (9 Bom. H. C. Rep. 60) dissented from.

Quære—Whether notice, to the purchaser, of the existence of a prior unregistered mortgage would in any way affect the provisions of the Registration Act.

MAKANDA'S KA'LIDA'S v. SHANKARDA'S HARIBHA'I ... 241

MULI TENURE.

. See KA'NARA LAND REVENUE ... Appx. 1

MUNICIPAL BODY—*Town duty—Spirits—Toddy.*

See INJUNCTION. ... 199

NOTICE, CONSTRUCTIVE.

See ATTORNEY AND CLIENT, VENDOR AND PURCHASER. 262

OFFICE, HEREDITARY, RIGHT TO

. See HEREDITARY OFFICE ... 172

OFFICER—*Meaning of the word under Section 21 of The Indian Penal Code.*

See PENAL CODE. ... 1

PARTIES—*Suit by one of two co-sharers to oust a tenant.]*

Where a suit was brought by one of the two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of the other co-sharer:

Held that the suit was not maintainable, and that the plaintiff could only sue jointly with his co-sharer, though the plaintiff was sole manager of the joint estate,

KRISHNA'RA'V JAHA'GIRDA'R v. GOVIND TRIMBAK ... 85

PARTITION, SUIT FOR—*Omission of a mortgaged field from claim—Subsequent suit—Civil Procedure Code (Act VIII of 1859), Sec. 7—Limitation—Separation in living and separation by partition.]*—In 1861, the plaintiff brought a general partition suit (No. 1363) to recover his share of the family property in the possession of the first defendant, and did not include in that claim a field then in the possession of a mortgagee.

The field was subsequently redeemed by the first defendant, who again mortgaged it to the second defendant. The plaintiff then filed the present suit to recover his share in the field. The first Court allowed the plaintiff's claim, but the District Judge in appeal threw it out, on the ground that it was barred both by section 7 of the Civil Procedure Code and by the law of limitation. The Judge based the latter finding on certain allegations made by the plaintiff in suit No. 1363 and in another suit brought by him against the first defendant and the then mortgagee of the field, from which allegations the Judge inferred a separation between the plaintiff and the first defendant :

Held in special appeal that the claim was not barred by section 7 of the Civil Procedure Code (Act VIII of 1859), because the mortgaged field was not available for an actual partition at the time of the former suit No. 1363 of 1861. *Held*, also, that the suit was not barred by limitation, because the possession of the first defendant, or of his mortgagee, was not adverse to plaintiff, the alleged separation being only a separation in living as distinguished from a separation by partition.

The true question for consideration in cases of this kind is, whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second, and where the former suit is one for an actual division of property, the plaintiff is not bound in it to ask for a declaration defining his right in property not then capable of division.

NA'RAYAN BA'BA'JI DA'BHOLKAR v. PA'NDURANG RA'M-
CHANDRA D'ABHOLKAR 148

PARTNERSHIP—*Agreement collateral to wagering transaction.*] Where the parties to an agreement (prior to the coming into force of Bombay Act III of 1865) collateral to a wagering transaction, stand to each other in the relationship of partners, and not merely of principal and agent, they are severally liable for contributions, proportionate to their several shares, towards the losses incurred by the partnership in respect of such wagering transaction.

PA'RAKH GOVARDHANBHA'I HARIBHA'I v. RANSORDA'S
DULABHDAS 51

Rights of a deceased partner—Adjustment of a partnership account—Payment by partners—Presumption—Execution—Seizure of partnership property in execution against one partner.] A suit based on the right of a deceased partner cannot be limited to a demand for his share in the proceeds of property alleged to have come into the possession of the partnership during its existence. The agreement on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assets, if any, must all be taken into account, and the suit must demand such a sum, if any, as, on a general account, and an account between the deceased partner and the co-partnership, being taken, shall appear to be due.

Payments made by the different partners of a firm are presumed to have been made out of the funds of the firm where the contrary is not proved by any satisfactory evi-

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denoe, and when a firm consisting of two members is dissolved by the death of one partner, the presumption is that the deceased was entitled to a moiety of the existing assets.	
It is an improper way of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property, to sell that part, and then distribute the proceeds between the executing creditor and the other partners of the firm.	
Principle on which the account of a dissolved partnership should be adjusted, explained.	
KESHAV GOPAL GINDE <i>v.</i> RAYA'PA' ...	165
PATEL, RIGHT TO OFFICE OF.	
See HEREDITARY OFFICE ...	172
PATILKI WATAN—Act XI of 1843—Civil Courts' Jurisdiction—Collector.] The plaintiff had two shares, and the defendant one in a <i>patilki watan</i> . In an action brought by the plaintiff to establish his right to officiate twice as often as the defendant,	
Held that the plaintiff was not necessarily entitled to such right, though the fact of his holding two shares in the <i>watan</i> might be a reason for the Collector to exercise his discretion under Act XI of 1843 (when it was in force) in favour of the plaintiff by assigning to him a longer period of management than to the defendant, in the event of the two sharers not agreeing as to the person to officiate.	
Quære—Whether the Civil Courts have jurisdiction to entertain such a suit.	
BHAVA'NI SADA'SHIV <i>v.</i> BHAVA'NI MA'NA'JI ...	232
PENAL CODE (INDIAN), SEC. 21, CL. 9, & SEC. 193—Public servant—Officer—Izafatdar—The Code of Criminal Procedure, Secs. 455, 456—Charge—Conviction of offence not charged—Re-trial.] The word "officer" in section 21, clause 9, of the Indian Penal Code means a person employed to exercise to some extent a delegated function of Government: he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. Hence an <i>izafatdar</i> , i.e., a lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself, is not an officer, and, therefore, not a public servant within the meaning of section 21.	
The making up falsely of accounts with the intention of producing them before a forest officer not empowered by law to hold an investigation and take evidence, is not a fabrication of false evidence within the meaning of section 193 of the Indian Penal Code.	
Where a person was charged by an Assistant Session Judge with (1) attempting to commit criminal breach of trust as a public servant; (2) framing as a public servant an incorrect document to cause an injury; (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent,	

The High Court held that the Judge ought to have convicted him of attempting to cheat under sections 455, 456 of the Code of Criminal Procedure; and, as the facts which he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing, though not distinctly taken in their appeal by the Government, and ordered a re-trial of the accused.

REG. v. RA'MAJIRA' V JIVBA'JIRA'V. ...

POSSESSION, SUIT TO RECOVER—*Right of occupation—Mirás land—Burden of proof—Regulation XVII of 1827, Sec. 7, Cls. 1 & 2—Bombay Act I of 1865.* On the 23th August 1857, the plaintiff passed a *kabuláyat* to Government, and took possession of certain *mirás* land abandoned by the *mirásdár* for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In an action brought by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them. Both the lower Courts rejected the claim. The lower Appellate Court based its decision on the ground that as the plaintiff failed to prove the fact of his alleged partnership with the defendants he could not succeed notwithstanding the Court found in the plaintiff's favour the other facts stated above:

Held in special appeal that as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Regulation XVII of 1827, cls. 1 and 2, and Bombay Act I of 1865, have called upon the defendants to prove their claim to hold possession as against the plaintiff's right of occupation.

TRIMBAK RA'NU v. NA'NA BHAVA'NI ...

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PRACTICE—*Abatement of suit—Insolvency of plaintiff—Civil Procedure Code (Act VIII of 1879), Secs. 106 & 119—Notice—Dismissal of suit—Limitation.* Section 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff after the institution of a suit became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited,

Held that such order was irregular.

Held, also, that the Official Assignee having notice of the order was not entitled to further notice of the setting down of the suit for dismissal, he not having given the security required, and that the giving of such security was a condition precedent to his being made a party to the suit.

Where the suit was dismissed in accordance with the terms of the order mentioned above, and the Official Assignee did not apply within thirty days of the passing

of the order of dismissal, either to the Court making the order or to the Appellate Court for its reversal,

Held that an application to the Appellate Court for the reversal of an order discharging a rule *nisi* for the reversal of the order of dismissal, and for the restoration of the suit to the board for hearing, was barred.

IBRAHIM BIN MAHA'SIN v. ABDUR RAHIMA'N ALLI. ... 257

PRACTICE—Appeal—Registration—Certificate of sale registered after decree but before appeal.] The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale certificate dated 20th September 1865. The first Court decided against the plaintiff, on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875 the plaintiff filed an appeal in the High Court against that decree, and on the 26th July 1875 applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related.

Held by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree.

Quere—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it, in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate.

Quere—Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing.

LA'LBA'I LAKHMIDA'S v. NAVA'L MIR KAMA'LUDIN
HUSEN KHA'N ... 247

Decree—Execution—Act XXIII of 1861, Sec. 11—Mortgage—Redemption.] An application to the Court, passing a decree for possession in favour of the heirs of a mortgagee for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.

The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose.

RA'VI SHIVRA'M JOSHI v. KA'LURA'M ... 160

A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgagee should remain in possession until the mortgage debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to possession of the mortgaged property. Both the lower Courts granted the mortgagor's application.

On special appeal *held* (following the decision of the Full Bench in *Ravji Shivram Joshi v. Kaluram Malukchand*) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.

RA'MCHANDRA BALLA'L v. BA'BA' ESGONDA ... 163

PRACTICE—*Parties to suit—Suit by one of two co-sharers.*]

Where a suit was brought by one of two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other co-sharer:

Held that the suit was not maintainable, and that the plaintiff could only sue jointly with his co-sharer, though the plaintiff was sole manager of the joint estate.

KRISHNARA' V JAHAGIRDA'R v. GOVIND TRIMBAK ... 85

—*Appeal from order—Order made by Commissioner for taking Accounts—Civil Procedure Code (Act VIII of 1859), Sec. 363.*] The question whether or not an order is appealable, is one for the decision of the Court.

An order passed in a suit, referring it to the Commissioner to take the accounts between the parties, is a decree.

An order, passed on a certificate given (under Rule 371 of the Equity Rules of the Supreme Court) by the Commissioner, subsequently to the order of reference, is appealable.

HIRJI JINA' v. NA'ERAN MULJI ... 129

—*Petition for leave to appeal to Privy Council.*] The petition should state the substantial question of law which it is proposed to submit to the Privy Council. At the Original Side of the High Court all such petitions should be signed by counsel, and at the Appellate Side they should be signed by counsel or by a pleader.

MIRZA' ALI AKBAR, KHA'N BAHADUR v. ABDUL LATIFF SHUSTEI ... 8

—*Costs—Payment of the costs of a summons not a condition precedent to proceeding with the suit.*] The Court will not order, as a condition precedent to proceeding to the hearing of a suit, the payment of the costs of a summons adjourned from chambers into Court and there dismissed with costs.

SOKA'BA'I v. LAKSHMIBAI ... 9

—*Appeal—Point not raised in lower Courts.*] A point not raised in the Courts below, was disallowed as being too late when raised in the special appeal for the first time.

RAMA'BA'I SA'HEB PATVA'RDHAN v. APFA' ... 13

—*Appeal—Points raised on appeal not taken in the Court below—Civil Procedure Code (Act VIII of 1859), Secs. 351 & 353—Costs.*] The Appellate Court will not remand a case for re-trial on a point not raised in the Court below, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondent's costs of appeal.

HARIDA'S PURSHOTAM v. HENRY AMBLE ... 23

PRINCIPAL AND AGENT—*Wagering contracts—Agency—Partnership—Act XXI of 1848—Bombay Act III of 1865.*] Act XXI of 1848 simply annuls all contracts by way of wagering, and prohibits any suit in respect of them, but does not declare them to be unlawful; and neither by the provisions of Act XXI of 1848 nor by Hindu law is the agent of a wagerer precluded from maintaining against the latter a suit for moneys paid by the agent to the other wagerer, or his agent, in respect of the loss of the wager, nor from recovering fees and brokerage due to him as agent in effecting, or for services in connection with, the wagering transaction.

Bombay Act III of 1865 has not a retrospective force, and, therefore, applies neither to agreements collateral to wagering contracts entered into prior to its coming into operation, nor to interest subsequently accruing due on such agreements.

Where the parties to an agreement (prior to the coming into force of Bombay Act III of 1865), collateral to a wagering transaction, stand to each other in the relation of partners, and not merely of principal and agent, they are severally liable for contributions, proportionate to their several shares, towards the losses incurred by the partnership in respect of such wagering transactions.

PARAKH GOVARDHANBHAI HARIBHAI v. RAMSORDA'S DULLABHAI'S

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PRIVY COUNCIL, PETITION FOR LEAVE TO APPEAL TO—*Practices.*] The petition should state the substantial question of law which it is proposed to submit to the Privy Council. At the Original Side of the High Court all such petitions should be signed by counsel, and at the Appellate Side they should be signed by counsel or by a pleader.

MIRZA ALI AKBAR, KHA'N BAHADUR v. ABDUL LATIFF SHUSTRI

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PUBLIC SERVANT.

See PENAL CODE

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REGIMENTAL DEBTS' ACT, 1863, 26 & 27 Vic., C. 57; SECS. 3, 4, 5, 6, 7, 8, 10, 12, 22, & 35—*Royal Warrant, Cl. 17—Committee of adjustment—Notice—"Person"—Bonâ fides.*] The president of a committee of adjustment, appointed under the provisions of 26 & 27 Vic., c. 57 (Regimental Debts' Act, 1863), wrote to the bank a letter, enclosing the order by which the committee had been appointed, stating that he had given over to the widow of a deceased officer the whole of the estate of her husband by direction of the Military Secretary to Government, and requesting the bank to conform to her instructions concerning the amount of deposit receipts then in charge of the bank in the name of the deceased officer. The widow had taken out no letters of administration to the estate of her husband, nor had she a preferential claim or any preferential charge against it, but she paid all the preferential charges. On receipt of the letter from the president of the committee of adjustment, the bank paid over all the moneys of the deceased officer in their hands to his widow. In a suit brought against the bank by the first plaintiff (the granddaughter of the deceased officer,) who had taken

out letters of administration to his estate on 6th June 1873, and her husband, the second plaintiff, to recover two-thirds of the moneys so paid by the bank to the widow with interest.

Held that on the payment, by the widow, of the preferential charges, the whole of the property remaining in the hands of the committee was "surplus", within the meaning of section 5 of the Regimental Debts' Act of 1863, and that, assuming the Agra Bank at Bombay to be "within the command," within the meaning of section 7, the moneys of the deceased officer in the hands of the bank, as being part of such "surplus", should have been dealt with by the committee in accordance with the provisions of section 10 of the Regimental Debts' Act, 1863, and clause 17 of the Royal Warrant, and should have been remitted to the Military Secretary to Government.

Held, also, that the Military Secretary to Government had no authority to pay or order the payment of such "surplus" to any person except in accordance with the provisions of section 12 of the Regimental Debts' Act of 1863.

Held, also, that section 8 of the Regimental Debts' Act of 1863 did not render it incumbent on the widow, for the purpose of ousting the jurisdiction of the committee of adjustment, to pay the preferential charges before the committee had taken any steps under section 7. The true construction of section 8 is that, on payment of the preferential charges, the committee of adjustment must be regarded as *functi officio*, except for the purpose of reporting, and should make over whatever property they have, which comes under the denomination of "surplus", in accordance with the terms of section 10.

Held, also, that the letter of the president of the committee of adjustment was a sufficient notice to the bank that the committee were *functi officio*, and that the period had arrived when the civil law stepped in to regulate the case.

Quære—Whether the bank could be held to be a person within the meaning of section 22 of the Regimental Debts' Act of 1863; but, even if it could,

Held that the bank were not protected by that section, the payment by them not having been made to a "representative" as defined in the Act.

Held, also, that the bank were not protected by section 35 of the Regimental Debts' Act, the payment not having been made in "pursuance" of the Act, and the carelessness of the bank in paying the money having been such as to amount to positive negligence, and debar them from pleading that they acted under the *bonâ-fide* belief that the payment was made in pursuance of the Act.

E. SARSTEDT v. THE AGRA BANK, LIMITED. ...

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GISTRATION—*Act XX of 1866, Sec. 17—Agreement relating to a family arrangement.*] Where a document was in the nature of a family arrangement, and drawn up mainly for the purpose of settling a widow's maintenance, though some right in immoveable property was created or declared by such instrument, and it was proved that the actual value of the whole of the immoveable property mentioned in the document exceeded Rs. 100, but there was no evidence to show that the value of the widow's right exceeded that sum :

Held that, for the purpose of registration under Act XX of 1866, the actual value of the whole immoveable property named in the document must not be taken to be the value of the right so created or declared.

NILAVA' KOM RACHAPPA' v. RUDRAYA' BIN RACHAPPA' ... 141

REGISTRATION—*Act VIII of 1871, Sec. 17, Cls. 2 & 3, Secs. 18 & 49—Agreement for purchase of immoveable property contemplating a future conveyance—Payment of earnest-money.*] A “bargain paper” for the purchase of immoveable property above the value of Rs. 100, which contemplates the execution of a future conveyance, does not require registration.

JUSAB HA'JI JA'FAR v. HA'JI GUL MUHAMMAD ... 175

—*Act XX of 1866, Secs. 18 & 50—Execution—Sale—Contest between two rival auction-purchasers—Certificate of sale—Act VIII of 1859, Sec. 259.*] Plaintiff and defendant were two auction-purchasers. Plaintiff's purchase was prior, but his certificate of sale was not registered. Defendant's purchase was subsequent, but he was in possession, and his certificate was registered. Registration was optional in both cases. In a contest as to priority between plaintiff and defendant,

Held that, under the provisions of Act XX of 1866, sec. 50, the defendant's title must prevail against that of the plaintiff.

PANHA' KHUMA'JI v. FATTA' UPA'JI ... 179

—*Certificate of sale registered after decree but before appeal—Practice—Evidence.*] The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale certificate, dated 20th September 1865. The first Court decided against the plaintiff on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875, the plaintiff filed an appeal in the High Court against that decree, and on the 26th July 1875 applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related.

Held by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it, or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree.

Distinction pointed out between this case and *Mohidin v. Mahaddji* (S. A. 437 of 1872).

Quære—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it, in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate.

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Quere—Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing.

LA'LBHA'I LAKHMIDA'S v. NAVA'L MIR KAMA'LUDIN HUSEN KHA'N... ... 274

REGISTRATION—*Mortgage*—*San mortgage*—*Act XX of 1866, Sec. 50.*] Under section 50 of the Registration Act, XX of 1866, a registered instrument takes effect as regards the property comprised therein against every unregistered instrument relating to it, whether or not the grantor of those instruments be the same.

As between himself and his mortgagor, and also as against any subsequent unregistered assignee of the latter, an unregistered *san* mortgagee in Gujarát has a perfectly valid charge upon the property mortgaged; but his right against such property is liable to be defeated by the mortgagor or his heir or such assignee conveying it to another by a registered instrument, while his own title remains unregistered.

Lakhmichand v. Kastar (9 Bom. H. C. Rep. 60) dissented from.

Quere—Whether notice, to the purchaser, of the existence of a prior unregistered mortgage would in any way affect the provisions of the Registration Act.

MAKANDA'S KA'LIDA'S v. SHANKARDA'S HARIBHA'I ... 241

REGULATION IV OF 1827, Secs. 62 & 66—*Court's sale*—*Right of owner to contest right of auction-purchaser*—*Title*—*Limitation.*] All that passed under a Court's sale under Regulation IV of 1827 (like a similar sale under the Civil Procedure Code) was the right, title, and interest of the judgment-debtor, whose property was proclaimed for sale, and it was quite open to a person claiming such property as his own, to contest the right of the auction-purchaser and those claiming under him to interfere with his possession at any time within twelve years of the occurrence of the disturbance.

KUSHA'BA' BIN SANKROJI v. PITAMBARDHA'BI... ... 15

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See ASSESSMENT ... Appx. 1, 225; 275

SEC. 7, CLS. 1 & 2—*Bombay Act I of 1865*—*Right of occupation*—*Mirds land*—*Burden of proof.*] On the 28th August 1857, the plaintiff passed a *kabuláyat* to Government, and took possession of certain *mirds* land abandoned by the *mirds*dar for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In an action brought by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them. Both the lower Courts rejected the claim. The lower Appellate Court based its decision on the ground that, as the plaintiff failed to prove the fact of his alleged partnership with the defendants, he could not succeed, notwithstanding that Court found in the plaintiff's favour the other facts stated above:

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<i>Held in special appeal that as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Regulation XVII of 1827, sec. 7, cls. 1 and 2, and Bombay Act I of 1865, have called upon the defendants to prove their claim to hold possession as against the plaintiff's right of occupation.</i>	
TRIMBAK RA'NU v. NANA' BHAVA'NI	144
REGULATION XVII OF 1827 (BOMBAY).	
See LAND REVENUE	Appx. 1, 225, 275, 276
RELIGIOUS COMMUNITY— <i>Rule for the regulation of dissident parties in a community distinguished by some religious profession.</i>] When the Court, in exercise of its charitable jurisdiction, is called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the litigants will be regulated by reference to the religious tenets held by the community in its origin, and a minority holding those tenets will prevail against a majority which has receded from them.	
THE ADVOCATE GENERAL <i>ex relations</i> DAYA' MUHAMMAD v. MUHAMMAD HUSEN HUSENI	323
RELIGIOUS ENDOWMENTS— <i>Superstitious uses.</i>] The English law relating to superstitious uses does not apply in the case of Hindu religious endowments.	
KHUSA'LCHAND v. MA'HA'DEYGIRI	214
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SARDA'B, SUIT AGAINST— <i>Jurisdiction of Civil Court.</i>] Creation of the defendant as Sardár in 1867 cannot have a retrospective effect so as to affect a suit instituted against her in the Civil Court in 1861, and to render the decree of that Court one without jurisdiction.	
RAMA'BA'I SA'HEB PATVARDHAN v. APPA'	13
<i>The Code of Civil Procedure (Act VIII of 1859), Secs. 284-5—Decree against a third Class Sardár—Execution against his son—Procedure.</i>] Under the authority of section 284 <i>et seq.</i> the Court of the Agent for Sardárs, not having jurisdiction over a Sardar's son who is not himself a Sardár, cannot transfer a decree passed against the Sardár to a Civil Court for execution against the son. To obtain enforcement, in such a case, against his heir of a decree against the Sardár, the decree-holder may file a suit in the ordinary Civil Court on his decree.	
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- SLAVERY—*Act V of 1843.*] The effect of Act V of 1843 is to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery; and a suit, brought by the heir of the master of a slave-girl, emancipated by and married to such master in his life-time, to recover, as such heir, her property in the hands of persons descended from her, is one the cognizance of which is barred by section 2 of the Act
MIR AJMUDDIN KHAN v. ZIA-UN-NISSA BEGAM ... 156
- STAMP—*Document stamped after execution but before tender—*
Evidence—Act XVIII of 1869, Secs. 5, 18 and 28.] A document, which by law requires a one-anna adhesive stamp to be affixed, must be received in evidence if, at the time of its being tendered, it bears the requisite stamp, even though such stamp has been affixed subsequently to the execution of the document.
BHA'URA'M MADAN GOPA'L v. RA'MNA'RAYAN GOPA'L ... 208
- SUCCESSION.
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- SUMMONS, PAYMENT OF COSTS OF, NOT A CONDITION PRECEDENT TO PROCEEDING WITH THE SUIT.] The Court will not order, as a condition precedent to proceeding to the hearing of a suit, the payment of the costs of a summons adjourned from chambers into Court and there dismissed with costs.
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- SUNI MUHAMMADANS, HISTORY OF.
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- SUPERSTITIOUS USES.] The English law relating to superstitious uses does not apply in the case of Hindu religious endowments.
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- TODDY—"Spirits"—*Bombay Act III of 1872.*] Toddy-juice, whether in a fermented or unfermented state, is not "spirits" within the meaning of Bombay Act III of 1872, and is, therefore, not liable, on importation into Bombay, to a town duty of As. 4 per gallon imposed on spirits by Schedule B of that Act.
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<i>See CUSTOM OF SHROFFS</i>	113
VENDOR AND PURCHASER— <i>Sale of land—Specification of area—Misdescription.</i> The specification in a deed of sale of land of the area of the land sold <i>prima facie</i> implies that the area was regarded as material by the parties, and, unless it is clear that the precise area was not regarded as material, proportional compensation will be awarded to the purchaser of land, the real area of which is found to fall short of the area specified in the deed of sale.	
SULEMA'N VA'DU v. TRIKAMJI VELJI	10
Constructive notice— <i>Secrecy—Attorney and client—Practice—Costs.</i> The Court will not presume notice to have been given to his client by an attorney where such notice would involve a confession, by the attorney, of a fraud practised by himself.	
The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser.	
Where the respondent had been guilty of such secrecy, the Appellate Court gave the appellant his costs in both Courts.	
HORMASJI TEMULJI v. MA'NKUVARBA'I	262
WAGERING CONTRACTS— <i>Act XXI of 1848—Bombay Act III of 1865—Hindu Law—Agency—Partnership.</i> Act XXI of 1848 simply annuls all contracts by way of wagering, and prohibits any suit in respect of them, but does not declare them to be unlawful; and neither by the provisions of Act XXI of 1848 nor by Hindu law is the agent of a wagerer precluded from maintaining against the latter a suit for moneys paid by the agent to the other wagerer, or his agent, in respect of the loss of the wager, nor from recovering fees and brokerage due to him as agent in effecting, or for services in connection with, the wagering transaction. <i>Moteelal Heeralal v. Jumnadas Umrootal and another</i> (2 Borr. Rep. 676) overruled.	
Bombay Act III of 1865 has not a retrospective force, and, therefore, applies neither to agreements collateral to wagering contracts entered into prior to its coming into operation, nor to interest subsequently accruing due on such agreements.	
Where the parties to an agreement (prior to the coming into force of Bombay Act III of 1865), collateral to a wagering transaction, stand to each other in the relationship of partners, and not merely of principal and agent, they are severally liable for contributions, proportionate to their several shares, towards the losses incurred by the partnership in respect of each wagering transaction.	
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DUTY—*Devotion of action—Devotion of duties attached to action.* A devotion, even though sanctioned by the Government, or the performance of the duties attached to an important action, does not alter the nature of the action and make it payable.

SAYARIBAI v. ANANDAY 224

PAULHI WALAN—*Act XI of 1843—Jurisdiction of Civil Court.* The plaintiff had two shares, and the defendant one in a *Paulhi walan*. In an action brought by the plaintiff to establish his right to officiate twice as often as the defendant.

Held that the plaintiff was not necessarily entitled to such right, though the fact of his holding two shares in the *walan* might be a reason for the Collector to exercise his discretion under Act XI of 1843 (when it was in force) in favour of the plaintiff by assigning to him a longer period of management than to the defendant, in the event of the two shares not agreeing as to the person to officiate.

DHANAI SADASHY v. DHANAI MANAY 232

WIDOW—*Maintenance of grandson's widow in preference to son's widow.* A Hindu died leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently, his grandson died a minor, leaving his widow (also a minor) him surviving.

Held that the grandson's widow succeeded in preference to the son's widow, according to the rule of intestate inheritance, the latter being entitled to maintenance out of the family property.

BAI ANSHU v. BAI MANU 70

SUIT BY A HINDU WIDOW HAVING A SON—*Limitation—Certificate of guardianship—Act XX of 1864—Civil Procedure Code (Act VIII of 1859), Sec. 73.* In 1864 a Hindu widow, having a minor son, sued, in her own name and on her own behalf, to recover certain immovable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871, the son, who had in the meantime attained his majority, in *lithe*, was made a co-plaintiff on his own application.

Held that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff, the plaint previously to that time having been in the widow's own name and expressly on her own behalf.

Held, also, that as the widow had no certificate of guardianship, she was precluded by Act XX of 1864, from bringing a suit in her own name in respect of her son's property, and that making the son a co-plaintiff in 1871 could not change the character of the suit, as it had existed previous to that date, so as to defeat the law of limitation.

Held (by Pinhey, J.) that the minor was wrongly made a plaintiff in 1871.

GOPAL KASHI C. RAHAGIAI SAHEB PATYARDHAN.

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WILLS.—Trust.—Executor.—Investment.—Share.—Conversion.—Liability of an executor in Bombay to make good the loss occasioned in the estate by his neglect to convert the shares owned by his testator.] The rules and decisions of the Court of Chancery in England, relative to the duty of an executor to convert in the absence of any special direction to that effect in the will do not, without great qualifications, apply in the High Court of Bombay; and the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee, in such manner as to form an authoritative guide to him in his administration of the estate.

Therefore, where the will of a Portuguese testator contained no special direction for conversion, nor any sufficient indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residua successively *in specie*, so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to their testator, which subsequently became much depreciated in value,

Held that the executors were not liable for the loss so occasioned to the estate of the testator.

M. A. DE SOUZA v. JOSEACIO FRANCISCO DE SOUZA.

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